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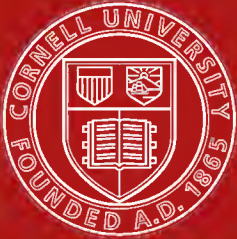
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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

The Petition of THE CUNARD STEAMSHIP COMPANY, LIMITED, as owners of the Steamship "LUSITANIA," for limitation of its liability.

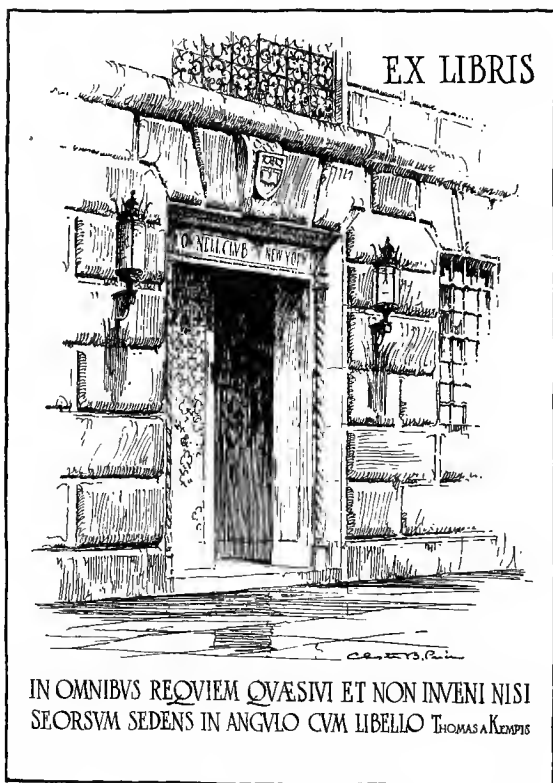
Before:

Hon. JULIUS M. MAYER, District Judge.

Brief on the Facts for the Petitioner

LORD, DAY & LORD,
Proctors for Petitioner,
49 Wall Street,
New York.

LUCIUS H. BEERS,
J. PARKER KIRLIN,
ALLAN B. A. BRADLEY,
Advocates.



PRESENTED TO THE CORNELL CLUB OF NEW YORK

BY *Louis Livingston Seaman*

DATE *Feby 8th 1925*; CORNELL *72*

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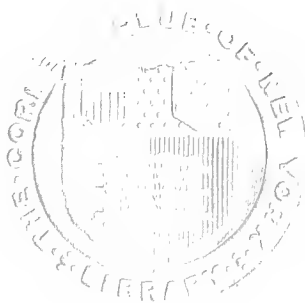
The testimony referred to below was taken as follows:

1. Before the Wreck Commissioners' Court in London, June 15th to July 1st., 1915. (Referred to as "Wreck Inquiry Q .")
2. At London from June 12th to June 22nd, 1917, before Mr. R. V. Wynne, under Commission issued from this Court. (Referred to as "Com. p. .")
3. Mr. Frederick Pickard, when about to leave with the A. E. F., was examined in New York, June 4, 1917. (Referred to as "Pickard Exam. p. .")
4. Mr. William M. Adams, when about to leave with the A. E. F., was examined in New York, April 15, 1918. (Referred to as "Adams Exam. p. .")
5. The trial before Judge Mayer at New York commenced on April 17, 1918, and continued until May 6, 1918. (Referred to as "Min. p. .")

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United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of the

Petition of the CUNARD STEAMSHIP COMPANY, Limited, as owner of the Steamship "Lusitania" for Limitation of Liability.

Before
Hon. Julius M.
Mayer,
District Judge

BRIEF ON THE FACTS FOR THE PETITIONER.

This proceeding is brought by the petitioner to obtain the adjudication of this court that it is not liable for any loss or damage arising out of the attack on, or the sinking of, the "Lusitania," but that if the court shall adjudge the petitioner is liable, then that the court limit the petitioner's liability to its interest in the "Lusitania" and her pending freight.

The facts are discussed at length below.

To avoid making unwieldy a necessarily long brief, certain questions of law which arise are discussed in separate briefs for the petitioner, as follows:

There were no cargo claims, and all of the persons by whom, or for whose death, claims were made were passengers on the "Lusitania" pursuant to contract tickets issued to and received

by each of them. These contract tickets had printed on their face, in the body of the contract, a clause providing that

“The Company will use all reasonable means to insure the ship being sent to sea in a seaworthy state and well found, but is not otherwise liable for loss of, or injury to, the passenger or his luggage, or delay in the voyage, whether arising from act of God, King’s enemies, perils of the sea, rivers or navigation, barratry or negligence of the Company’s servants (whether on board the steamer or ashore) defect in the steamer, her machinery, gear or fittings or from any other cause of whatsoever nature.” (Stipulation Min. 955) (Petr., Exs. 16, 18, 19, 20).

The petitioner contends that the legal effect of this contract must here be determined according to the laws of Great Britain and that under those laws these claimants cannot maintain their claims. This subject is discussed in a separate brief filed for the petitioner and relating to the application of British law.

It is not disputed that the “Lusitania” was sunk by a torpedo or torpedoes fired without warning by a German naval vessel, but the claimants contend that the petitioner was guilty of certain acts of negligence, which so far contributed to the loss of life and to the damage as to make the petitioner legally responsible. The petitioner contends that if there had been acts of negligence on its part (and it denies that there were any) that still the torpedoing of the ship and not the acts of negligence was the proximate cause of the loss and damage. This subject is discussed in a separate brief filed for the petitioner dealing with the law of proximate cause as applied in the Federal courts.

By that brief it will be seen that if the act of the German commander in sinking the "Lusitania" without warning was a lawful act, then under the law of proximate cause the court must here consider whether that act of the submarine commander was a probable result of the alleged negligence of the petitioner. But if that act of the submarine commander was an unlawful act, then it is not necessary for the court to consider what its connection was with any alleged negligence on the part of the petitioner. For, under the law as to proximate cause, negligence of the petitioner cannot be the proximate cause of the loss if an independent *illegal* act of a third party intervened to cause the loss.

This raises the question whether the act of the submarine commander was, or was not, legal. This subject is discussed in a separate brief filed for the petitioner relating to the application of international law.

Certain of the claimants allege that the petitioner is not entitled to limit its liability because the passage tickets constituted personal contracts with the passengers.

That is a question which the Court will not have to consider unless it decides against the petitioner on the preliminary questions of fact and law so that it becomes necessary to consider whether the petitioner is entitled to limit. This subject is therefore considered at the end of this brief following a discussion of the subject of privity.

The petitioner claims that on the principles of law discussed in these briefs it is entitled to the relief here sought.

But there is more involved in this case than relief from mere financial liability. The petitioner seeks to satisfy the court not only that it is not liable, but that it has been faithful to the trust reposed in it by its passengers, and that the tragic losses which the passengers and their families suffered when the "Lusitania" was torpedoed were the direct result of an unprecedented and murderous attack on an unarmed passenger vessel with its human freight of men and women and children.

The petitioner therefore willingly follows the claimants into a detailed discussion of the facts.

THE SHIP.

The "Lusitania" was a quadruple screw turbine steamship built by Messrs. John Brown & Co., on the Clyde in 1907. She was classed 100 A-1 at Lloyds. Her length over all was 787 feet and between perpendiculars 760 feet. Her tonnage was 30,395 gross and 12,611 net. She had 4 turbine engines, 25 boilers and 4 boiler rooms. She had 12 transverse bulkheads dividing the ship into 13 compartments, and had a longitudinal bulkhead on either side of the ship for 425 feet, covering all the vital parts of the ship. (Com. 1 to 4) (Wreck Inquiry, Ques. 1 to 21.).

Mr. Peskett, who had for thirty-two years been the Company's Naval Architect, said of the ship (Com. 7): "Everything that was possible, that science could suggest or experience could devise, was done. The ship was, of course, the collaboration of many skilled people, including all the highest talent we have in the country, Sir Philip Watts, Sir William White and Mr. Froude, all of whom of course are leading authorities and they were

assisted by the data that the Company itself possesses.”

No evidence was offered controverting this statement as to the ship.

PASSENGERS AND CREW.

On her last voyage the “Lusitania” carried 1257 passengers, of whom 290 were first-cabin, 600 were second-cabin and 367 were third-cabin, and she had a crew of 702 members, making a total of 1959 souls on board. Of the 702 members of the crew, 77 were in the Deck Department, 314 were in the Engineering Department, 306 were in the Stewards Department (stewards, stewardesses, cooks, etc.) and there were 5 Musicians.

The ship was capable of carrying 2198 passengers and a crew of about 850, or about 3,000 in all. (Mr. Peskett Com. p. 5).

BOATS AND LIFE BELTS.

On her last voyage the “Lusitania” had 22 open life boats capable of accommodating 1,322 persons. In addition, she had 26 Collapsible Life-boats, capable of accommodating 1,283 persons, or a total of 48 boats with a total capacity of 2,605 persons. (Mr. Peskett, Com. pp. 5 and 6.) She carried 3,012 life-belts for adults and 175 life-belts for children and had been fitted with 20 life-buoys. (Mr. Peskett, Com. p. 6.) (Capt. Manley, Com. p. 332.) That is, she carried 1,228 life-belts above the 1,959 required to provide one for each person aboard.

Capt. Manley, Assistant Marine Superintendent of the Cunard Company testified fully as to the condition of the boats and life-belts, as to

the furnishing of new boats in March, 1915, etc. (Com., p. 330, 331 and 332.)

The vessel was not armed. (Mr. Peskett, Com. pp. 7 and 8; Capt. Turner, Wreck Inquiry, Ques. 61 to 63, Com. page 36; Mr. Bowring, Min., page 484) and never had been (Com. p. 7).

CHARACTER OF CARGO.

The manifest shows a general cargo (See manifest, Exhibit W. T. T. I.). There were no explosives aboard (Capt. Chalmers, Min., 18; Capt. Turner, Com., p. 36).

The fuse cases and shrapnel cases referred to in the manifest consisted merely of steel and brass (Struble, Min. pp. 44 and 49). See also sample of shrapnel shell, (Petitioner's Exhibit 11) and sample of fuse case, (Petitioner's Exhibit 12).

A number of cases of small-arms rifle ammunition was carried and it was proved that these cases are shipped freely by express, freight or otherwise (Standish, Min., p. 39), that the cases could not be exploded by setting them on fire in mass or in bulk (Standish, Min. p. 42) and that they are not explosive by shock (Lippincott, Min. pp. 35 and 36).

INSPECTIONS.

Inspections of the ship were made at Liverpool by the Board of Trade Engineer and Ship Surveyor on March 17 and again on April 15, 1915 (Mr. Laslett, Wreck Inquiry, Ques. 28 and 47), and the survey was signed (See Exhibit H. C. S. 1 and 2). On April 16 and 17, 1915, inspections were also made by the Board of Trade Emigration Officer at Liverpool (Capt. Barrand, Wreck

Inquiry, Ques. 50 and 53; Mr. Peskett, Com., p. 29). Thompson testified that in New York before the "Lusitania" sailed on her last voyage he accompanied Mr. Bestic, the Junior Third Officer, in an examination of the boats, that they overhauled all the boat gear and all the boats on the port side, took all the gear out and checked it off on the list and put the articles back in the boats, replacing any defective articles, and that a similar work was done on the boats on the starboard side and that it took several days to do it (Min. p. 671). Robertson, the ship's carpenter, testified that he inspected all the boats in New York and found them in perfect condition (Com. p. 225).

BOAT DRILLS.

Capt. Turner testified that there was boat practice while the ship was in New York before this voyage. He was asked—

"Q. Was it your business?

A. The staff captain went down and I was also on the bridge watching them doing it.

Q. Was it done well?

A. Yes.

Q. Had you present in your mind the fact that war was on?

A. Yes. It was done very well." (Com. p. 33).

The Captain also testified that every day during the voyage there is a boat drill in which eight men and an officer take part; different men taking part on different days. (Com. p. 77).

Mr. Cockburn, Senior Second Engineer, testified as to boat drill in New York (Wreck Inq. Q. 799). Mr. Jones, First Officer, testified that he was at the boat drill at Liverpool. (Wreck

Inq. Q. 971). O'Neill, an A. B., testified that at New York he took part in the boat drill. (Wreck Inq. Q. 1676). Mr. Jones, Chief Steward, testified that he attended boat drills in Liverpool and New York. (Com. p. 279). John C. Morton, an A. B., testified to taking part in boat drill every morning. (Com. p. 173). Kidd, a second cabin steward, testified that he had taken part in boat drill at Liverpool and New York, and that all the other stewards did. (Com. p. 281). He further testified that on the boat drill at New York some of the boats were lowered into the water. (Com. p. 283).

Mr. Pierpont, a first cabin passenger testified as to the boat drill on the voyage. He said that he was generally out on "A" deck walking up and down and used to see them go through the boat drill each day. (Com. p. 320). He further testified (p. 327) as to the nature of this drill and said that they would lower the boat a certain distance and then hoist it in again.

Capt. Chalmers, Assistant Pier Superintendent at New York, testified that on this voyage all hands were mustered for boat drill; that the boats were all swung out and those on the port side were lowered to the water and several of them pulled away from the ship around the slip for practice with the oars.

Thompson, an A. B., who attended the trial, testified that at New York on that voyage there was a boat drill. "The boats on the port side were lowered to the water; some four or five boats were detached and rowed away in New York Harbor, for about an hour or so."

He was asked

"Q. Did you personally go away in one of the boats?

A. I did."

In reply to a question by the Court as to how many men would be in the boats he said about a dozen men. (Min., 670).

SHIP'S COURSE.

On approaching the Irish coast on the morning of May 7, 1915, the ship passed about 25 or 26 miles south of the Fastnet, which was not in sight. The course was then held up a little to bring the ship closer to the land, and, soon after, land was sighted, which the Captain took to be Brow Head (Capt. Turner, Wreck Inquiry, Ques. 69, 70 and 74). This course appears to have been S. 87 E. Mag. Having picked up Brow Head, and at about 12.40 P. M., the course was again altered in shore by about thirty degrees, to about N. 63 or 67 E. Mag. (Capt. Turner, Com. p. 49). The course was held in shore so as to make sure where she was and to be certain what the land was that was seen (Com. p. 50). The new course, N. 63 E. was held for an hour, until 1:40 P. M., when the Old Head of Kinsale was sighted and the course was then altered, back to the original course of S. 87 E. and at 1:50, ten minutes later the Captain started to take a four point bearing on the Old Head of Kinsale (Com. pp. 51, 52; see also Chart W. T. T. 4). While the four point bearing was being taken and at about 2:10 P. M., the vessel was torpedoed.

THE SPECIAL PRECAUTIONS ON APPROACHING IRISH COAST.

On approaching the coast, on May 6th, the Captain ordered all the boats hanging on the davits to be swung out and lowered to the promenade deck

rail. Captain Anderson, who went down with the ship, attended to having this order carried out (Com. p. 37). (Mr. McConnel Com. pp. 156, 157.)

All bulkhead-doors which were not necessary for the working of the ship were closed and it was reported to the Captain that this had been done (Com. p. 37).

Lookouts were doubled, and two extra were put forward and one either side of the bridge (Com. p. 38); that is, there were two lookouts in the crow's-nest, two in the eyes of the ship, two officers on the bridge and a quartermaster on either side of the bridge (Wreck Inquiry, Ques. 200, 201). (Com. p. 38.)

Directions were given to the engine room to keep the highest steam they could possibly get on the boilers and in case the bridge rang for full speed to give as much as they possibly could (Com. p. 39).

Orders were also given that ports should be kept closed.

(Jones Com., p. 275).

(Griffith Min., pp. 277, 288, 289 and 290).

(Duncan Min., p. 544).

(Lewis Min., pp. 597, 598).

The Captain also testified that he timed his speed so as to reach Liverpool on the morning of May 8th, at the earliest time when he could cross the bar without waiting for a pilot (Com. p. 47).

The expert witnesses who were asked as to the precautions which might be taken to avoid submarines testified to the protection afforded by darkness. It will appear that Captain Turner used this protection as far as possible. The chart prepared for the court as showing the actual location of previous submarine attacks will show that

the most dangerous waters which the "Lusitania" would have to travel were from the entrance to St. George's Channel, to Liverpool Bar, and Captain Turner arranged his course so as to pass these waters in the dark.

This adjustment of speed so as to run the last 150 miles of the voyage in the dark was something which could not have been made until the ship was close to the Irish coast, for until then it was impossible to know what delays might have to be met by reason of the weather (Com. p. 85). There had in fact been fog on the morning of May 7th and it was not until this cleared away and the Captain could figure on a clear run that he could adjust his speed so as to take advantage of the darkness at the most dangerous points.

THE TORPEDOING.

No warning whatever was giving before the attack was made. At about 2:10 P. M., Quinn, who was the starboard lookout in the crow's-nest, and Morton, who was the starboard lookout on the fore-castle head, both saw approaching on the star-board side a streak of foam indicating the approach of a torpedo (Wreck Inquiry, Ques. 379 and 416). This was immediately reported to the bridge (Same, Ques. 468).

The witnesses were by no means unanimous as to the number of torpedoes that struck the ship. Some of the witnesses for the petitioner and some for the claimants testified to having heard only one explosion. This, at best, merely amounts to a statement of what they did not hear, and it is explained by the testimony of Mr. Davison who is unquestionably an expert on torpedoes. He was asked: "What should you say as to the shock that

would be caused to the ship by a torpedo striking it?" He answered, "It would kill the people in the fire room for example and the people immediately adjacent. If you get towards the end of the ship you should not feel it much. You would feel a jolt, but the ship is more or less elastic and you would not mind it several hundred feet away; but all of that part where the electric lights and fixtures and lamps and glass, all the things that are near that part of the ship would be broken but way off them they would not be affected probably" (Min., p. 842).

On the other hand, the testimony of those who said that two torpedoes were exploded on the ship was affirmative and circumstantial and as will be seen they could not well have been mistaken as to the facts to which they testified.

Mr. Adams, a passenger and a witness whose deposition was taken for the claimants as he was about to leave with the American Expeditionary Forces, testified that after lunch on May 7th he went to the lounge, which was forward of the smoking room, and was there when the first torpedo struck. He said: "The ship shook very violently. For all I know, she might have gone ashore, it was so violent; that was the first torpedo." Immediately following this shock, there was a "crashing sound on the roof," of debris and water coming down. He then ran to the companionway on the starboard side and stood in the doorway opposite the main staircase and elevators. "I was just in time to see a streak in the water, slightly forward of where I was. * * * That was followed immediately by a loud explosion and a column of water went right up by me, right straight up in the air, and came down on the deck with a crash" (Adams

Examination, pp. 5 and 6). On cross-examination, Mr. Adams testified again as to this (p. 21) and said (p. 24) that as near as he could judge the second torpedo hit the ship about thirty seconds after the first.

Mr. Freeman, a passenger, testified that he was sitting with his wife on the promenade deck looking at the Irish coast (so he must have been on the port side) when the first torpedo struck. "We stood looking and immediately there was a second explosion and that was followed by hot water and steam; and it seemed to me that there were cinders as well" (Wreck Inquiry, Q. 1185).

Mr. Lehman, a passenger called by the Claimants, testified that he was sitting in the smoking room when the torpedo struck and it sounded like a subway blast, that he did not feel any shock, "not perceptibly, nothing like I felt afterward," and that he ran out on deck (Min. p. 272), that when he got there "I looked right ahead of me and I saw a torpedo coming right at us. * * * I ran to the other side of the boat in order to get away, thinking that the torpedo would strike right underneath." He heard the breaking of wood and felt the shaking of the vessel, "in fact, the vessel shook like a leaf" (Min. p. 294).

Mr. Brooks, a passenger called by the Claimants, testified that he was on deck walking toward a friend who was on the starboard side when he saw the torpedo coming on the starboard side. He ran to the rail and stood leaning over to watch the explosion, which he expected to see occur (Min p. 193). As he stood watching the torpedo, the shock came, "A tremendous—or a solid shock went through the ship, as if it had struck an immovable object, and instantly up through the

decks went coal, debris of all kinds, as far as I could distinguish it, in a cloud, up in the air and mushroomed up 150 feet above the Marconi wires" (Min. p. 196). He left the rail and attempted to get in under the shelter of the Marconi house to avoid the debris and water, which hit him on the shoulders and knocked him down (Min. p. 197). As soon as he could, he jumped to his feet and started to run forward on the starboard side to the assistance of passengers who were also knocked down by the side of the Marconi house on the starboard side, "when there was a slight second shock and immediately up through this vent or through the eruption next to the forward funnel came clouds of dense steam" (Min. p. 198).

Morton, an able seaman, who was starboard lookout on the forecastle head and who was afterward commended for helping to save the lives of a number of passengers, testified:

"I saw a big burst of foam about 500 yards away, four points on the starboard bow. Immediately after, I saw a thin streak of foam making for the ship at a rapid speed, and then I saw another streak of foam going parallel with the first and a little behind it."

"Q. Are you quite clear in your recollection that you saw two of these streaks of foam?

A. Absolutely."

He went on and testified,

"The first one seemed to hit her between Nos. 2 and 3 funnels and the second one went just under No. 3 funnel, as far as I could judge from forward" (Wreck Inquiry, Q. 416, 417, 419).

Mr. Duncan, the Senior Third Engineer, testified at the Wreck Inquiry and also at the trial that after the first explosion, when he was trying to pacify the people, he heard the sound of a second explosion. He was on the port side of C deck and thought the second explosion must have been nearer to him than the first, "because where I was standing there was a thermo tank and a piece of the thermo tank flew off and dropped at my feet after the second explosion" (Wreck Inquiry, 1448, 1449; Min. p. 536).

Mr. Little, Senior Third Engineer, was on watch when the ship was sunk. He was in the engine room when the torpedo struck. He testified that he felt two distinct concussions (Com. p. 266).

Kidd, a second-cabin bedroom steward, who had made ninety trips on the "Lusitania," testified that after she was torpedoed he went up to the boat deck "and all of a sudden there was another bump, an explosion" (Com. p. 281).

Mr. Lewis, Acting Senior Third Officer, testified that he was in the dining saloon when the first torpedo struck, that he got up and was leaving the saloon when there was a "heavy report and a rumbling noise, like a clap of thunder," that it was accompanied by a sound of broken glass, and that it was "on the starboard side, on the starboard side forward of me but closer than the first one was, farther aft than the first one" (Min. pp. 608, 609). Speaking of the second shock again, Mr. Lewis testified "the ship vibrated just the same; it was just the same for the second report as for the first one" (Min. p. 658).

Considering the excitement which would naturally prevail after the first torpedo struck, it is not surprising that some witnesses in the confusion did

not notice the effect of the second, especially if they were in parts of the ship where the shock was not particularly communicated. But witnesses who have testified, as above referred to, to actually seeing the streak of the second torpedo or to seeing the water and debris thrown up by the second explosion cannot well have been mistaken.

THIRD TORPEDO.

O'Neill, an A. B., who had served in the British Navy, testified that he was in the baggage room when the ship was struck, that he jumped into the lift with four or five other men of the watch and went on deck and when he got there

“I saw what appeared to me to be a torpedo that had missed the ship *going away from the starboard quarter.*”

“Q. What did you see in the water that led you to form that opinion?

A. Well, the wash. I have seen torpedo work and it was a torpedo that I saw going away from the ship. It just missed her by a few feet.

Q. And passed under the stern?

A. Yes.

Q. From what direction?

A. It must have been fired from the port side.

Q. Have you any doubt at all that what you saw was a torpedo?

A. None whatever” (Wreck Inquiry, Q. 1677 to 1685).

Casey, a fireman, testified that he had formerly served in the Naval Reserve, where they were given instructions how to recognize a torpedo

when it was coming through the water. At about two o'clock he was on the starboard side of the "Lusitania," between the after end of the engineers' quarters and the commencement of the second-class cabins. A shipmate called his attention to something on the water and he said he saw two white streaks approaching the ship and that afterwards there seemed to be two explosions. He said that this was not the last torpedo he saw.

"Q. Tell the court what you saw next.

A. When we were getting ready to go down the rope to go over the side aft there was the streak of a third torpedo coming from a diagonal direction.

Q. On what side?

A. On the starboard side.

Q. From starboard to port?

A. It was fired from the forward end on the starboard side, not the same as the others, in the straight line but in a diagonal line.

Q. Did that strike the ship?

A. No" (Wreck Inquiry, Q. 1713-1725).

From the fact that Casey saw this third torpedo when he was getting ready to go down the rope to go over the side aft the ship must have been near to her final plunge and had probably turned so as to be about at right angles to the course she was taking when first torpedoed, so that a submarine which had previously been on the port side of the "Lusitania" might be brought on to her starboard side when she turned and headed for the land. It is not surprising that others of the ship's company, who had much to think of, did not see these torpedoes which failed to hit. But these two, O'Neil and Casey, who had

both been trained in the Navy to observe torpedoes, cannot well have been mistaken when they testify to seeing a third one.

It sufficiently appears that the Germans intended not merely to cripple the "Lusitania" but to destroy her, from the fact that they fired two torpedoes into her. Their firing a third torpedo from the other side only goes to make more apparent a purpose already sufficiently apparent.

LOCATION OF TORPEDO EXPLOSIONS.

Many of the witnesses testified as to the places where they thought the torpedoes struck judging from the sound or from the shock; but there was also testimony as to the physical effect of the explosions which enables us to locate them with more accuracy.

Mr. Griffith, Chief Third-Class Steward, testified that at the time of the first explosion he was standing on the port side of C deck, forward of the Third-Class entrance (See diagram, L. P. 1; and Min. p. 273). He immediately went to his room, which was on the starboard side of the same deck immediately aft of the main Third-class entrance. This room is shown on the diagram L. P. 1 and is marked "Third-class Steward and Inspector."

It appears by the diagram, and Mr. Griffith so testified, that this was not an outside room but that it had two windows opening on the funnel casing of No. 2 funnel (Min. p. 274).

When Mr. Griffith reached the room the door was shut (p. 273). On opening it, he found that "the room was full of smoke, a kind of brown smoke" and this smoke was not like anything

that he had seen on the ship before and it was very dense (p. 274). This shows that explosive gases from a torpedo had forced their way up the casing of No. 2 funnel hatch, and an examination of the plan L. B. 5 will show that these explosive gases must have come from Boiler Room No. 2 and that the torpedo must have burst the bulkheads and the ship's side on the starboard side of No. 2 Boiler Room.

Madden, a fireman, was working in No. 1 Boiler Room (or Stokehold) when the explosion came. Upon being asked where he thought the explosion came from he said:

“I thought it came from the forward end on the starboard side, from the forward side of the starboard boiler.”

“Q. Did water come into the boiler room?

A. Yes.

Q. How soon after you heard the explosion?

A. About two or three minutes.

Q. Was it much water?

A. Well, I ran to the watertight door, that was shut down, and by the time I got back it was coming through the boilers. There would be about a foot and a half then.

Q. Then, I think, you got to the escape ladder and up the ventilator?

A. I got knocked down by the force of the water, but I got up and went up the escape ladder and got out on the deck” (Wreck Inq., Q. 1730-1734).

Davis, a trimmer, who was working in the same No. 1 boiler room, testified that at ten minutes past two he went to the forward bunker-hatch to load up his barrow and returned to the amidships pass and that the explosion came when he was

just at the end of the pass No. 1, near the center stokehold. He was asked:

“Q. What happened?

A. There was a loud bang and there were objects blowing about and the lights went out.

Q. Could you form an opinion as to where the explosion took place?

A. The bang seemed to come from the after end on the starboard side of No. 1.

Q. No. 1 what?

A. No. 1 stokehold, No. 1 boiler” (Wreck Inq., Q. 1738-1743).

McDermott, who was a trimmer, testified that when the ship was struck he was working in No. 2 Stokehold (or Boiler Room) on the starboard side. Asked for his opinion as to the place where the torpedo struck, he said: “I think she was struck at the after end of No. 2, between the two boilers. I ran to about three parts of the way between the boilers when a rush of water met me and knocked me off my feet and I was struggling in the water two or three minutes.” (Wreck. Inq., Q. 1745, 1748). Mr. Duncan testified that McDermott was the only man who could be found to have been saved out of the watch working in No. 2 Boiler Room at the time the ship was struck (Min. p. 551).

Quinn, the A. B. who was on the lookout in the crow’s nest and who saw the torpedo coming was asked:

“Q. Where did it strike?

A. It struck right amidship near No. 5 boat and splintered No. 5 boat to pieces” (Wreck Inq. Q. 381).

By referring to the plan L. P. 1 it will be seen that this would have brought the torpedo almost directly opposite Mr. Griffith's room, at the side of No. 2 funnel; that is, abreast of No. 2 Boiler room.

Morton, the A. B. who was the lookout on the forecastle head and who testified to seeing the two torpedoes approaching, said: "The first one seemed to hit her between Nos. 2 and 3 funnels and the second one just under No. 3 funnel, so far as I could judge from forward."

Mr. Jones, Chief Steward, testified that when the torpedo struck the ship he was just outside the main companionway on the starboard side (Wreck Inq. Q. 1359) on B. deck (Q. 1360, 1361).

By reference to the plan of the ship, (L. P. 1), it will be seen that he was just forward of No. 3 funnel. He had testified that just before the ship was struck he was crossing the main companionway and was told by a second steward while he was coming across that a torpedo was approaching the ship on the starboard side. "I walked outside and saw it coming.

Q. You saw the torpedo?

A. Yes.

Q. In what direction?

A. Coming right down for the ship on the starboard side.

Q. Can you tell us how far away from where you were standing the torpedo struck the ship?

A. I should say about *twelve yards abaft from where I was standing*" (Wreck Inq., Q. 1307-1313).

Mr. Jones cannot well have been mistaken as to whether the torpedo was forward or aft of where

he was standing, and his testimony would indicate that this torpedo struck at least as far aft as abreast of the third funnel.

Mr. Bowring, a passenger, entirely agrees with Mr. Jones as to the place where this torpedo struck. Mr. Bowring testified that the first knowledge he had that the ship was torpedoed was "a column of water right by the port-holes close to where I was sitting and the port-holes being driven in and the glass flying all round, almost up to us" (Min. p. 472).

Later, he said, on cross examination, that the glass from the ports was blown right in toward him and that it was all round him when he got up (p. 494).

On petitioner's Exhibit 3, Mr. Bowring has marked the Purser's table in the dining saloon at which he was sitting, and from the fact that glass from the ports was blown around him it is clear that the torpedo struck at least as far aft as the third funnel and possibly aft of that. (Diagram L. P. 5). Mr. Jones had said that the torpedo struck about twelve yards aft of where he was standing just outside the main companionway, and by comparing petitioner's Exhibit 3 with Diagram L. P. 2, it will be seen that Mr. Bowring was sitting at the Purser's table on the starboard side of the main saloon about forty feet aft of the main companionway.

A comparison of plan L. P. 2 with L. P. 5, which shows the watertight subdivisions, will show that the middle of the Purser's table was about sixteen feet forward of the transverse bulkhead separating No. 3 and No. 4 boiler rooms.

Captain Turner was asked:

"Q. Do you know where she was struck?

A. A big volume of smoke and steam came

up between the third and fourth funnels, counting from forward. I saw that myself'' (Wreck Inq., Q. 94; Com. p. 54).

Mr. McConnel a passenger, testified that he was walking forward on the deck on the port side when he heard the explosion and saw a blast of dirt come out of No. 2 funnel (Com. p. 151).

Hennessy, an A. B. who was the special lookout on the port side of the crow's nest and who had followed the sea for twenty-four years, testified that Quinn, who was also in the crow's nest, called his attention to the torpedo that was coming. He said that as nearly as he could judge it struck between No. 1 and No. 2 funnels (Com. p. 199).

Mr. Lauriat, a passenger, testified that when the torpedo struck he was standing on the boat deck (A deck) on the port side, between boats 8 and 10, as marked by the letter "L" on plan L. P. 1. He said:

"We heard an explosion, a muffled sound and we looked in the direction of the sound and saw some smoke and cinders flying up in the air on the starboard side.

Q. That was forward or aft of you?

A. That was aft of where I was standing'' (Min. p. 91).

By reference to the plan L. P. 1 it will be seen that Mr. Lauriat was standing at a point on the port side which was between No. 2 and No. 3 funnels, so, as he saw the smoke and cinders flying up aft of him, the explosion must have been at least as far aft as abreast of No. 3 funnel and this would quite correspond with the testimony of Mr. Jones and others.

Mr. Grab, a passenger, testified that when the ship was hit he was standing on A deck, on the starboard side aft of boat No. 19 (Min. p. 377. See plan L. P. 1). He says that he saw the periscope of the submarine and saw the torpedo approaching, that he leaned over the rail and could see where the torpedo hit the ship and that it was between the first and second funnels (Min. p. 379).

From the testimony above referred to about smoke and debris being blown up through the second funnel and the funnel casing it appears that one torpedo struck somewhere abreast of No. 2 boiler room; and from the testimony of those who saw a torpedo strike abreast or aft of the third funnel or who saw cinders blown up from that point, it appears that another torpedo struck abreast of No. 3 boiler room or between No. 3 and No. 4. Mr. Peskett testified that he had heard that boiler rooms 3 and 4 were open to the sea through the explosion of one of the torpedoes (com. p. 22).

EFFECT OF EXPLOSIONS.

Mr. Spear testified that the Germans were then using torpedoes 18 inches in diameter by 17 feet long, carrying explosive charges of not less than 300 and not over 400 pounds of T.N.T. (Min., p. 771, 772). He thought that such a torpedo would cause a rupture of the outer hull from 30 to 40 feet in length and from 10 to 15 feet vertically (Min., p. 772).

Mr. Davison also testified that the rupture made by a torpedo would be longer horizontally than vertically (Min., p. 838).

Speaking from observation of a case of torpedoing, Mr. Peskett said:

“One has seen results from ships that have got into dock and the damage then, of course, is very severe in all directions. The last one I saw had a hole in the side which was 35 feet in length by 25 feet; that was the hole itself and then, of course, all the internal structural work was cleared away” (Com. p. 27).

Mr. Cockburn, Senior Second Engineer, thought the explosion had done a great deal of internal damage (Com. p. 262). He testified that the lights were out but that he could hear water coming into the engine room (Com. p. 262 and 263).

It appears from testimony which has already been referred to that water at once entered boiler rooms No. 1 and No. 2. This could not have happened unless one or both of the coal bunkers on the starboard side of those boiler rooms were also blown open. So, the direct effect of the explosion of one torpedo was to flood some or all of the coal bunkers on the starboard side of No. 1 and No. 2 boiler rooms and also to flood those two boiler rooms.

It appears from the testimony of Mr. Peskett, who was responsible for the design and construction of the “*Lusitania*” (Com., p. 2), that the ship was built so as to float with not more than two adjacent compartments open to the sea and that in making this computation the side coal bunkers are also considered to be compartments, so that the ship would not float with two boiler rooms flooded and also any adjacent coal bunker. (Com. pp. 24 and 25.)

It follows from this that the flooding of No.

1 and No. 2 boiler rooms, with one or more of the adjoining coal bunker compartments, would of itself have sunk the ship. *But in addition to this there is the evidence above referred to that another torpedo struck either abreast of boiler room No. 3 or boiler room No. 4 or between No. 3 and No. 4.*

From the testimony of Mr. Bowring and of Mr. Jones, noted above, we know that one of the torpedoes struck opposite, or very nearly opposite, the place where Mr. Bowring was sitting in the main dining saloon, and we also know that the center of that small table at which he was sitting was about sixteen feet forward of the transverse bulkhead between boiler rooms No. 3 and No. 4.

Prof. Hovgaard, testifying for the claimants, was questioned by the Court as to the probable effect of the explosion on the interior bulkheads. He said that he thought it unlikely that a transverse bulkhead forty feet away would be seriously injured. He was then asked by the Court for his opinion in case the explosion took place midway between two bulkheads; that is, twenty feet from each, and he answered: "It is quite conceivable then that the bulkhead would be injured, partly directly by the pressure and partly by fragments of the structure being hurled up against the bulkhead." (Min., p. 248). According to Mr. Bowring's testimony, this torpedo cannot well have been more than twenty feet from the main transverse bulkhead between boiler rooms No. 3 and No. 4 and it may have been much nearer.

Certain of the immediate effects of the explosions have already been referred to. In addition

were the following: The ship could no longer be controlled by the engines, all the steam had gone (Mr. Cockburn Com., p. 261), and Mr. Little, Senior Third Engineer, who was on duty at the time, says that in 10 or 15 seconds after the explosion the steam pressure fell from 190 to 50 pounds and his explanation for that was that the main steam pipers or boilers had been carried away. (Wreck Inq. Q. 657). The engines could not be used to stop the ship and she retained her headway and kept that headway up to the time when she actually sank. The lights were out, (Mr. Little, Com., p. 268), Mr. Cockburn, Com. p. 262). The vessel immediately started to list over to starboard. The particulars as to this list will be given later. (Mr. Lewis, Min. p. 609).

SITUATION IMMEDIATELY AFTER THE TORPEDOING.

(a) THE PASSENGERS.

The evidence shows that the first effort of the passengers was to get to the boat deck and that they crowded the stairway and the upper decks to such an extent as to hinder the crew in their work.

Immediately after the torpedoing, there was no panic (Royd, Wreck Inq., Q. 1081; Wreck Inq., Q. 1063) but great excitement (Tootal, Wreck Inq., Q. 1182; Duncan, Wreck Inq., Q. 1447; Thompson, Com., p. 220).

There were people rushing about in all directions (Clark, Wreck Inq., Q. 1144). Mr. Freeman, a passenger, testified that there was a little screaming and confusion among the passengers, who rushed to the promenade deck (Wreck Inq.,

Q. 1185); that he went back to the second cabin quarters of the vessel and found there was no panic there (Wreck Inq., Q. 1194) and that practically the whole of the 600 second-class passengers had come up on to the deck (Wreck Inq., Q. 1223).

Mr. McConnel says,

“I could not tell you how long it took me to get down to the cabin, because at different points I had to wait for the great crowd of people coming up. There was no pushing. Everybody was very kind and civil; but at the same time everybody was wanting to come up and I was wanting to go down” (Com. p. 152).

Mr. Myers, a passenger, said,

“There was great confusion and lots of excitement; everybody was pouring up through the companionway” (Min. pp. 350, 351).

Mr. Bowring said,

“The passengers were rushing and trying to get in the boats and all the people passing back and forth and rushing around, they were interfering with these ropes which were let down from the hurricane deck; they had been coiled up there and when they started coming down the people were walking past and naturally getting in the way of those falls” (Min. p. 503). Mr. Bowring says “When I got up there the boat deck was very very crowded” (Min. 476).

These statements show the unavoidable rush and confusion among the passengers, and as the

increasing list of the ship soon made it impossible to do anything with the port boats the passengers crowded over on the starboard side.

(b) THE OFFICERS.

As we have seen, extra lookouts had been set and as soon as the torpedo was sighted it was reported to the bridge (Quinn, Wreck Inq., Q. 379) and the officer there reported it to the Captain (Wreck Inq. Q. 92). Second Officer Heppert, who was on the bridge, immediately closed all watertight doors worked from the bridge (Wreck Inq. Q. 152, 153); those connected with the various departments reported to Captain Turner that the watertight doors which were worked by hand had been closed (Wreck Inq. Q. 155, 156); and First Officer Jones also testified that the Carpenter's yeoman reported to him that everything was shut below (Wreck Inq. Q. 1032). The Captain went across to the starboard side, saw the wake of the torpedo and immediately there was an explosion (Wreck Inq. Q. 92). The Captain then went to the navigation bridge and had the ship's head turned to the land and as he saw the ship still had much way on he signaled to the engine room for full speed astern to take the way off her (Wreck Inq. Q. 103). He then ordered the boats lowered down to the rail (Wreck Inq. Q. 100 and 614) and directed that the women and children be first provided for in the boats (Mrs. Lasseter, Wreck Inq. Q. 1935).

There was no response from the engine room to the order "Full speed astern" and as the ship continued under way the Captain gave orders to hold on lowering the boats until the vessel should lose her headway and he told Staff Captain An-

derson to lower the boats when he thought the way was sufficiently off to allow them to be lowered (Wreck Inq. Q. 106). Captain Anderson, Staff Captain, was in charge of the port boats (Wreck Inq. Q. 1009) and he was there (Com. p. 186; Adams Dep. p. 9) and went down with the ship (Wreck Inq. Q. 192).

First Officer Jones superintended the handling of the starboard boats (Wreck Inq. Q. 1008), was in charge of boats 11 to 19 (Exhibit J. I. L. 1), and actually engaged in the launching (Wreck Inq. Q. 1010-1019). Mr. Lewis, Acting Senior Third Officer, was in charge of boats 1 to 11 (Min. 611) and was actively engaged there (Min. p. 612, 613). Mr. Bestie, Junior Third Officer, was in charge of boats 2 to 10 (Wreck Inq. Q. 1380) and he was engaged in the endeavor to launch them until the ship went down under him (Wreck Inq. Q. 1385). It appears from Exhibit J. I. L. 1 that the Second Officer was in charge of boats 12 to 20. Mr. Bowring says the officer was there, passing back and forth between the boats all the time (Min. p. 480).

THE LIST.

Practically all of the witnesses who were on the ship testified that after the explosions the ship commenced to list *immediately*.

Countess de Cippico, a passenger examined for the claimants, testified—

“I felt a great big shock and I was thrown about a great deal and she listed tremendously” (Min. p. 7). Asked how soon the list began after the shock, she said “It seemed almost immediately” (p. 8).

Mr. Lauriat, a passenger examined for the claimants, said—

“She took a list to starboard almost at once. I should think about 15°” (Min. p. 92).

Mr. Gauntlett, a passenger examined for the claimants, said:

“I heard the sound and felt the jar and the vessel took a list to port. * * * and then the ship came back to starboard. The force of the concussion gave her a list to port and she came right back and settled to starboard.

Q. How quick did the list to starboard come?

A. Directly” (Min. p. 115).

Mr. Hardwick, a passenger examined for the claimants, was asked—

“Q. What did the ship do after the shock?

A. She listed instantly” (Min. p. 321).

Mr. Chisholm, second steward, testified—

“The ‘Lusitania’ developed a list immediately she was hit” (Com. p. 360).

Mr. Readdie, a passenger examined for the claimants, testified—

“She listed immediately” (Min. p. 464).

Mr. Pierpont, a passenger, said—

“She listed right away to starboard” (Com. p. 321).

Mr. Adams, a passenger examined for the claimants, was asked—

“Q. How soon did the ship start to list after the torpedo struck her?

A. Almost immediately” (Adams Testimony, p. 7).

Mr. Jones, chief steward, also said “almost immediately” (Com. p. 276).

Numerous other references to testimony could be given to the same effect.

It is quite plain that this sudden and heavy list could only have been caused by the sudden loss of buoyancy on the starboard side; that is, by the sudden inrush of a great mass of water. We have seen above that two torpedoes struck the ship and the opinion expressed by Mr. Spear as to the hole which would be made by these German torpedoes was that each hole would extend from 30 to 40 feet fore and aft and from 10 to 15 feet vertically. The fact sustains Mr. Spear's opinion; that is, the immediate heavy listing of the ship goes to indicate that enormous holes had been blown in the starboard side through which a great volume of water immediately rushed. Nothing else could explain the fact of the list, and the suddenness of the list can only be explained by the great size of the holes made in the ship's side thus allowing a mass of water to come with a rush and not merely to work in slowly, as would be the case if it was flowing in through ports.

We can only surmise as to what effect the explosions of the two torpedoes had on the interior structure of the ship, for anyone who could have observed that effect would probably not have survived, and no witnesses testified directly on that subject. But some of the facts proved in the case indicate that these explosions blew in or ruptured

the interior bulkheads in the ship. Passengers who are claimants have testified that the force of the explosions blew debris up through the vessel to a considerable height. One passenger, who testified for the claimants, said, as above noted, "Up through the decks went coal, debris of all kinds, as far as I could distinguish it, in a cloud up in the air and mushroomed up 150 feet above the Marconi wires" (Min. p. 196).

Others as above noted, testified to seeking shelter to protect themselves against falling debris.

From Mr. Griffiths' testimony we know that explosive gasses had blown through the casing of the second funnel so as to get into his room; and from the testimony of Mr. Bowring, a passenger who was in the first cabin dining saloon when a torpedo struck, we know that the force of the explosion even exerted from the open air outside of the skin of the ship was sufficient to blow in the heavy glass in the ports alongside of the saloon. By reference to the rigging plan (L. P. 3) it will be seen that these ports were about 23 feet above the water line.

From these known facts the conclusion is irresistible that in the interior of the ship, where the explosive effect of the gases was confined, the explosion must have wrought havoc. The ship was built to resist the ordinary strains incident to navigation, even the strains caused by collision and stranding, but no passenger ship is built, or could be expected to be built, to resist explosive forces of this kind when used for the purpose of destroying such a passenger vessel.

Prof. Hovgaard was questioned as to the effect of the explosion of the torpedo, assuming that the

torpedo was say 9 feet below the water line (and he had previously testified that the torpedo would in most cases be 9 to 12 feet below the surface, (Min. p. 246).) He answered— “There can be no doubt that in that case the transverse bulkhead and the longitudinal bulkheads and the deck above would all be broken. He said of deck F that, “In all probability it would be broken through by the explosion” (Min. p. 247). And he further said, “I would not be surprised if it injured the main deck as well” (Min. p. 249). The main deck to which he referred is E deck (L. P. 2).

The claimants devoted some effort on the trial to pressing their contention that some of the ports were open thus letting water in, their claim apparently being that but for this more boats could have been successfully lowered or that the vessel might have reached the shore. On the other hand, it must be plain that even if all the ports had been open that could have had nothing to do with the *immediate* heavy list which the ship took after the explosion. As before stated, that sudden list can only be explained by the existence of rents in the ship’s starboard side large enough to admit the inrush of a volume of water sufficient to immediately take away so much of her buoyancy on that side as to cause her to keel over. Thus the suddenness of the list, which is a well established fact, amounts practically to a demonstration that there were these rents in the ship’s starboard side. And if they were big enough to permit this sudden great inrush of water, they were also big enough to permit the inrush to continue so as gradually to cause the ship to roll over and sink as she did. If the ports on the starboard side had been open, either by having been left open

or because they were blown in by the explosion, then after the harm had been done by the torpedoes some water would ultimately enter by these ports when the ship heeled over far enough for the water to reach them, but the water entering this way would be but "a drop in the bucket" compared with the enormous inrush which must have entered through the holes made by the torpedoes.

Prof. Hovgaard, examined for the claimants, was questioned as to the effect of the explosion of a single torpedo where a vessel has side bunkers and longitudinal bulkheads. He said: "The undoubted effect and inevitable effect is a transverse inclination of the ship. Q. Which means in ordinary language what—a list? A. It means a list, which is always dangerous to the ship and always highly objectionable because the lowering of the boats becomes difficult; the service of the ship is rendered difficult" (Min. p. 242).

He was asked: "Q. If the water were admitted to more than two of these side coal bunkers what effect would that have on the heel of the ship? A. That would increase the heel in the same proportion as the number of bunkers, practically, depending somewhat on the size of the bunkers. They are not all of equal size."

Several witnesses testified that the vessel for a very short interval stopped listing to starboard and started to recover and then that the list to starboard went on again until the vessel turned over.

Mr. Lauriat was asked whether the "Lusitania" righted herself to some extent. He answered:

“Yes, sir, she not so much righted herself as she stopped from going any further to starboard.

Q. How long did she remain in that position according to your observation?

A. Do you mean the list or the pitch?

Q. The list.

A. Several minutes.” (Min. p. 108).

Mr. Duncan, Senior Third Engineer, testified that after the torpedoing the ship went over, he thought, about ten degrees to starboard and that then “the ship started to come upright again; for the matter of a few seconds it was like she was going to right herself and then she went and listed heavily to starboard and went over and over” * * *

“Q. How long did that righting motion last?

A. Only a matter of seconds.

Q. A sort of rocking motion?

A. Well, yes, you could call it a rocking motion.

Q. Then she went over again to starboard.

A. Then she went over again to starboard” and from then the list to starboard continued until she went over (Min. pp. 537, 538).

Mr. Adams, a passenger, testified as to the list:

“She got to a certain point and then she stopped for a while and then she went on as I remember.

Q. Was that point reached very soon or did it take considerable time to get to the point where she stopped?

A. No, the point where she stopped was reached very soon.”

(Adams Deposition, pp. 7, 8.)

Mr. Bestie, Junior Third Officer, was asked as to the check in the list:

“Q. For how long did that little bit of rectification continue?

A. I suppose it could be numbered in seconds.

Q. And then what happened to the list?

A. Then she started to list to starboard much more than she had done before.”

(Com. p. 318.)

Johnson, the Quartermaster at the wheel, testified that the vessel took a list of about 15° to starboard; that “she stopped at 15° for a matter of just a couple of minutes and then continued to list going further over.” (Wreck Inq. Q. 592-593).

The only thing that could have caused this recovery was the entry of water into compartments on the port side so as to help balance the flooding of the coal bunkers on the starboard side.

The probability is that the same explosive force which was strong enough to blow debris far up above the Marconi wires (and they were over 160 feet above the water [L. P. 3]) was also strong enough, in the confined spaces in the interior of the vessel, to weaken the longitudinal bulkhead on the port side of the boiler rooms which the torpedoes blew open. Those boiler rooms were not more than 60 feet wide and great explosive force must have been brought to bear against those port longitudinal bulkheads, and those bulkheads were probably more or less bombarded by pieces of metal which were blown across the boiler rooms.

The first rush of the water must have flooded those boiler rooms and so the whole pressure of

the water soon came to be exerted against those longitudinal bulkheads on the port side, and if they had been weakened by the explosion the time at which they would have given way would be when the boiler rooms were themselves flooded, so as to bring the pressure of the water on these port longitudinal bulkheads. And as soon as they did give way the weight of water on both sides of the ship would be to that extent equalized and the ship would tend to recover until the inrush of water from the rents in the ship's starboard side made the starboard list continue. Several of the witnesses testified that there was not merely a checking of the list to starboard, but a recovery, as, for example, Chief Officer Jones thought that she recovered a number of degrees (Wreck Inq. 919). And as a matter of scientific demonstration it is impossible that there could have been any such recovery of the ship unless the weight on the two sides had been made more nearly equal by increasing the weight on the port side; that is, by the entry of water into compartments which were on the port side.

HANDLING OF THE BOATS.

CONDITIONS ON PORT SIDE.

We have already seen that immediately after the torpedoing the list to starboard commenced. It is plain that this would make it difficult to swing the port boats out at all, for the port boats would be swinging inboard. If enough force, that is, enough man power, were applied, the boats could, no doubt, have been pushed over the rail so as to be started on their way down the side of the ship, but then would come a difficulty and a danger much greater.

Mr. Robertson, the carpenter of the "Lusitania" was asked:

"Was it possible to lower the open boats on the port side of the 'Lusitania'? A. No. To lower the port boats would just be like drawing a crate of unpacked china along a dock road. What I mean is that if you started to lower the boats you would be dragging them down the rough side of the ship on rivets which are what we call, 'snap headed rivets.' they stand up about an inch from the shell of the ship, so you would be dragging the whole side of the boat away if you tried to lower the boats with a 15° list" (Com. p. 230).

These deck lifeboats are familiar objects and when one realizes their weight, especially loaded, it is difficult to see how such a heavy lap-streaked boat could be lowered for 60 feet or more down the inclined plane formed by the side of the listed ship without being so injured that the side or bottom of the boat would be torn to pieces to a greater or less extent.

Mr. McConnel, a passenger, testified to being on the port side of B deck. He said: "By that time there was so much list that a boat on the port side was obviously grinding against the side as the keel came in sight. There is a balustrade there which we lean over and as the boat came down past the roof of B, she was grinding against the side and trying to come in that opening. Then I saw that the only thing I could do to help anybody was to use my not very great strength in shoving to get the boat past the opening, because each of the planks of the boat caught on the ledge of the balustrade." (Com. p. 153).

This shows what must have happened with a lap-streaked boat, and when the rail of the boat and these planks of the boat with their projecting edges caught on the rivet heads of the ship as the boat went down scratching on the skin of the ship, the natural effect would be to tear the boat to pieces. That is, the projecting part of these boats, and especially the rails, would catch on the rivet heads on the ship's side. This would naturally tear away the wood and in a little while would leave little of the boat's rail. The entire weight of these loaded life-boats is carried by the falls at each end and if one of the rails was weakened or carried away it would, to that extent, leave the stem or stern posts of the boat unsupported. Two passengers testified in reference to two of the port boats that one of these end posts of the boat pulled out. Exactly what happened in other cases where an end of a boat fell we do not know for there was no exact testimony on the subject, but it is probable that injury to the boat caused the giving way of the arrangements at the bow or stern to which the falls were attached. The fact that Mr. Lauriat did not see a single port boat in Queenstown goes to confirm the view that the port boats must have been injured. We know that two of the port boats were lowered to the water and got away (though one afterward filled), but evidently they were too badly injured to be worth saving. These boats were worth about \$450 each (Com. p. 378).

The officers must have been confronted with a very serious problem in reference to these port boats; that is, half of the ship's boats were on the port side, and the starboard boats would not accommodate the people on the ship, so there

was a very strong reason for their trying to get the port boats down notwithstanding the difficulties. It will be seen that in the presence of this problem caused by the list the officers did the best they could; that is, Capt. Anderson, who was trying to force the boats over the port side sent to the bridge to have the port tanks filled so as to help get rid of the list and they tried to get the boats lowered.

Boat No. 2. Mr. Bestic was in charge (Wreck Inq. Q. 1380). Assigned to this boat were Cockburn (Wreck Inq. Q. 797), Hennessey (Com. p. 199), Thompson (Com. p. 217) and Chisholm (Com. p. 357). Mr. Chisholm, the Second Steward, testified that he went to this boat, to which he had been assigned, and that the boat had swung inboard and could not be swung out, (Com. p. 359) and that this was on account of the list.

Mr. Pickard, a passenger, testified that after the explosion he went where there were the least people, which was on the "starboard (misprint for forward) end of the ship" and he saw a boat there, and there were four people trying to swing the boat out. (Pickard Exam. p. 11). At another point in his deposition he stated that he was on the port side (p. 20) and that the boat to which he referred was "abreast of the bridge, so near that the Captain could touch me by the hand almost" (p. 25). It will be seen from the diagram L. P. 1 that the boat referred to must have been Port Boat No. 2. Mr. Pickard stated that this boat could not be pushed out because the davit was stuck, because it had been painted instead of being greased.

As opposed to this testimony a number of witnesses testified that all the boats had been swung

out on Thursday, and several witnesses testified that the boats were swung out and the boats lowered in boat drill in port, all of which, of course, could not be done if the davits were painted, or rusted fast.

The general concurrence of testimony agrees with what Mr. Chisholm said about this boat, that is, that the list was so bad that the port boats could not be swung out.

Mr. Pickard said (p. 11) that there were four people trying to swing this boat out. Anyone familiar with the size of one of these life-boats would not be surprised that four people were unable to swing it out against the list. There was testimony that twenty people could not swing out another one of the port boats.

Boats No. 4 and 6. No specific testimony as to these boats was given, except that Mr. Bestie, whose section was on the port side, (boats 2 to 10) testified that he continued his efforts to get these boats off until the ship went down (Wreck Inq. Q. 1385) but that none of them got away (Id. 1383).

Boat No. 8. Mr. Adams, a passenger, testified as to what happened immediately after the explosion of the torpedoes. "People were crowding around the life-boats and there was a crowd of people trying to push No. 8 life boat over the edge of the deck so that it could be lowered. The list was so great it swung right in and we were unable to push it over" (Adams Dep. p. 7). He said further that the life-boats came right in and all the people that were pushing on No. 8 were pushed right in and ran out of the way so that they would not be squashed between the life-boat and

the side of the smoking room (Adams Dep. p. 9). Mr. Griffith, third-class steward, was assigned to this boat and tried to get it over, but the weight of passengers and boat was so great that he could not. He talked with Capt. Anderson there (Min. p. 275, 276, 286).

Boat No. 10. Mr. Bestic said of this boat: "I started to get No. 10 lowered down to the rail but it landed on the deck. Capt. Anderson was there besides me and he said, 'Go to the bridge and tell them they are to trim her with the port tanks.' I made my way to the bridge and sung out that order to Mr. Heppert, the Second Officer, he repeated it (Wreck Q. 1381) and they said from the bridge that it was impossible (Com. p. 310), and I came back again and No. 10 boat was on the deck. We tried to push it out and we could not do it." (Wreck Q. 1381). Mr. Bestic also testified that a number of foreign male passengers had jumped into that boat and had to be taken out (Com. p. 309), that he continued working at the boats on his station until the ship went down and he went down with the ship (Com. p. 310). Mr. Baker, a passenger, also testified to efforts to launch a boat which was probably No. 10 (Wreck Inq. O. 1798, 1799).

Boat No. 12. Mr. Bowring saw attempts to lower three boats on the port side and thought they were Nos. 12, 14 and 16. He was not sure about the numbers. As to No. 12, he says that when he came to it "They were just filling it and as they started to lower it the passengers were very excited naturally; they were not panicky but they were very excited and they were around the ropes interfering with the working of the ropes

and getting in the way and the first boat was going down and the officer said, 'Let her go a little faster by the stern' and the man that had charge of the falls evidently could not let go quick enough so he threw a bight of the rope off the cleat and the stern absolutely lost control and the boat went right down stern first, held up by her bow. I looked over the side and saw the passengers being spilled into the water." (Min. p. 477).

Boat No. 14. Mr. Bowring testified that another of the boats which he saw launched was, he thought, No. 14. He said: "that they started to lower and she went down on an even keel and got, I should say, about half way down when I was looking over the side and saw that they evidently lost control of her—the falls—and she went down straight on an even keel right down on the people that were in the water out of the first boat." (Min. 478). When asked whether he observed what was the cause of the boat going down so fast he said: "I think it was just the interference with the men who were handling the boats. The ropes getting all tangled up among the crowd of people that were on the deck." (Min. 480).

Mr. Hardwick was not very clear as to the numbers of the boats which he observed. He thought he saw Nos. 14 and 16 on the port side lowered (Min. p. 330).

Mr. Baker, a passenger testified as to a port boat, the number of which he could not give, but he said it was opposite the reading room. He probably referred to the lounge, for it is common knowledge that much reading is done in the lounge, while the writing room and library are used largely for writing. Exhibit L. P. I. will show the ar-

rangement of these cabins on the "Lusitania," and, in referring to the port boat opposite the reading room, Mr. Baker probably referred to 12 or 14. He said "I saw the boat run away because the man at the bows could not hold the falls. At the stern the rope fouled and left the boat bows in the water and at an angle of about 45°" (Wreck Inq. Q. 1795). An explanation of what had really happened appears in his next answer, for he says—"I did not see the start of the lowering of the boat but when I looked over to see what had happened there was a young officer trying to climb into the bows. The stern post had been wrenched away from the sides so that when the boat did get into the water she could not possibly keep afloat." (Q. 1796).

Boat No. 16. Mr. Myers, a passenger, said that while he was in the bow of boat No. 20 he saw a boat a little farther forward fall as it was being lowered and he indicated boat No. 16 as being the boat that fell (Min. p. 363). He said he had a faint recollection that the boat which fell had gotten to about the level of the deck and then the forward part of the boat went down (Min. p. 363).

Mr. McConnel, a passenger, testified as above noted, that when he was on the port side of B deck a boat "was then coming down obviously grinding against the port side. * * * As the boat came down past the roof of B she was grinding against the side and trying to get in the opening. Then I saw that the only thing I could do to help anybody was to use my not very great strength in shoving to get the boat past the opening, because each of the planks of the boat caught

on the ledge of the balustrade. * * * She got down until the gunwale of the rowboat stuck there for a moment and I imagine—this is pure conjecture—that the man in control of the falls thought she was in the water, * * * that the boat had got down and she was absolutely firm there owing to the list of the ship for the moment. Anyway, the stern falls of that boat were let go and the stern of the boat fell and two or three people fell out, spread-eagled on the water. Then the other falls were very sensibly let go too and the boat fell into the water and righted. * * * By that time, it was absolutely impossible I should say to launch any boat on the port side.” (Com. p. 153).

It is not certain that Mr. Myers and Mr. McConnel both referred to No. 16, but it is probable that they did; and the fact too, which Mr. McConnel testified that the boat fetched up and hung for a moment as she was being lowered may well account for the slackening away of the falls.

The Rev. Mr. Clark, a passenger, also testified to being on the port side, where he saw a boat which was half lowered and the falls then seemed to get jammed and a number of people in that boat were spilled into the water (Wreck Inq. Q. 1121, 1122). This may also refer to boat No. 16.

Mr. Bowring testified that he thought one of the boats that he saw was No. 16 and that “they tried to lower her but the list had become greater and the stay between the davits broke and the davits and the boat had swung inboard.” (Min. 480). As boat No. 16 was lowered Mr. Bowring may have seen the boat while attempts were being made to get it over the side.

Boat No. 18. Mr. Lehman said that there was a seaman in command of this boat who was not lowering it because the Captain's orders were not to launch. Mr. Lehmann thereupon threatened to shoot the seaman unless he got the boat away (Min. p. 297). He said that before the boat got away it swung on its davits up against the smoking room smashing the passengers who were standing there and then that the water commenced coming "over the smokestack as it seemed," and the rush of water swept him off the "Lusitania" (Min. p. 298).

It is difficult to understand Mr. Lehman's testimony at this point, for he says afterward "The boat righted herself and finally that time she got away."

Boat No. 20. Mr. Myers testified that he and Mr. Kelly got into this boat (Min. p. 351) and upon hearing the order "Everybody out of the life-boats" they got out.

Mr. Hammond testified that he was told by a petty officer to get into this boat with his wife (Min. p. 171) that he did so and that with the boat about half filled, 35 people being in it, they started to lower and the man at the bow let the tackle slip and Mr. Hammond tried to grab it, but the bow dropped, the stern tackle held and everybody fell out of that boat from the top deck, which was about 60 feet above the water (Min. p. 172).

Mr. Brooks testified that he walked aft to watch the lowering of this boat and when he reached the point where it was being lowered it was pretty well down over the side, that apparently one end was held or caught and the other end kept on being lowered until it was at such an acute angle that the passengers slid to the end and were

spilled into the ocean (Min. p. 199) and one end of the boat kept lowering to an angle acute enough to settle until the weight became so much that the post pulled right out and it opened just like a scoop and they all went out (Min. p. 200).

Mr. Gauntlet testified that he watched them try to lower the first boat that was lowered on the port side—probably this boat—and that the man who was handling the forward falls lost control and the forward end of the boat fell and threw the passengers out and then the man handling the after fall let his go and the boat dropped into the water (Min. p. 116).

Mr. Lehman also saw the accident to this boat (Min. p. 295). He ascribed it to the weight of the boat's passengers, saying "one of the seamen who was handling the blocks and fall—I mean the rope—evidently it was too heavy for him and the rope slipped from his hand and one side of the boat went down and spilled all the passengers into the water and she broke off the other rope; naturally the other rope broke and they were all thrown into the water, including the boat."

It is difficult to separate this testimony as to the various port boats because passengers could not identify with certainty the boats to which they referred. Naturally enough, in those cases where accidents happened to boats, the facts were impressed on the passengers' attention and it was equally natural that if a boat did get down to the water successfully they may not have noticed it. We know that one of the port boats did get away successfully. Mr. Bestic so testified (Com. p. 317) and Miss Lines, a nurse in charge of two children, gives circumstantial evidence on the subject as to which she could not well have been mistaken (Wreck Inq. Q. 1775 to 1789). She tells

of going to the deck with a baby in her arms and a little boy hanging to her skirt (Q. 1782). She went to the port side and "had a hill to climb to get into the lifeboat" (Q. 1781). The boat got away safely and she and the children were all right.

Mr. Cairns, a passenger, also testified to having gone down in an unidentified boat which was swinging inboard and which he had to help to push out so as to get her over the rail. Obviously, this was a port boat. He said that soon after she got to the water she commenced to fill and soon capsized (Wreck Inq. Q. 1884).

Mr. Timmins also testified to the lowering of a port boat (Wreck Inq. Q. 1969) which he said reached the water evidently in good condition.

STARBOARD BOATS.

On the starboard side the boats naturally swung out and could be lowered clear of the ship, though they swung so far out from the ship as to make it difficult to get the passengers in them, but the same list which made it dangerous to lower boats on the port side drove the passengers to the starboard side in hopes of getting into the starboard boats, and there was much testimony as to this crowding.

Reference has been made to testimony to the effect that the list of the ship became so heavy as to make it impossible to walk on the deck without holding on to the rail, and this would especially make difficulty on the starboard side, which was the lower one.

In addition to these complications caused by the list was the difficulty in getting the boats safely away from the ship by reason of the headway of the ship. And there was also difficulty by reason of

the shortness of time before the ship sank. Because of this shortness of the time some of the starboard boats could not be cleared before the starboard edge of the boat deck reached the water and the davits caught in the boats.

Boat No. 1. Officer Lewis was in charge of this section (Com. p. 185). Leith, one of the wireless men, was assigned to this boat (Wreck Inquiry, p. 879). J. C. Morton, then an A. B., and now a Third Officer (Com. p. 170) was in this boat. He testified that an accident happened to this boat and "it was the speed of the vessel through the water that caused it. She was getting very low down in the water and the passengers refused to get into the boat when we went to lower it into the water. We tried to get them into it but they refused point blank and would not get into it. I lowered the boat into the water, with the idea of the passengers getting down the falls and the man ropes. After the boat had been lowered into the water they refused to come down the man ropes and I tried the patent releasers to make certain that they were in working order and I could not release the forward end, so I made the boat fast on the man rope from the davit head and then cut the boat falls, but the speed of the vessel through the water carried the man rope away." (Com. p. 175). He stated that it was because of the speed of the ship that he could not work the patent releaser as he could not get the weight off it (p. 176), that he and an A. B. named Brown were the only ones in the boat, and that after the man rope carried away the boat drifted down the side of the vessel and Boat No. 3 passed over her and crushed her, and that he went into the water, caught hold of No. 3 Boat and got into No. 3 Boat (p. 176).

Mr. Lewis testified to superintending and giving directions as to the loading of this boat No. 1 (Com. p. 187) (Min. p. 612). Mr. Lewis also testified that there were two sailors in it (Min. p. 612). The collision with No. 3 cannot have injured Boat No. 1 badly, for Mr. Lewis testified that he saw people in it; (Min. p. 612), and Mr. Lauriat testified that he saw the boat in Queenstown (Min. p. 661).

Boat No. 3. Mr. Lewis was in general charge of this boat (Com. p. 175). Quinn, an A. B., was in the boat (Wreck Inquiry, p. 384). Parry, an A. B., testified that he told a number of passengers to jump into No. 3 and that he lowered it down and that it got into the water all right; that he jumped off the boat deck, that the ship started to go over very quickly then, and in trying to push the life-boat off the side two davits caught the gunwale of the boat and turned her right over (Com. p. 212).

J. C. Morton who had testified to going down in Boat No. 1 and later getting into No. 3 testified that there were two men in No. 3 when he got into it. that later they got the boat full of passengers and were just starting away from the side when they saw a lady who was sitting on the collapsible boat and pushed the bow of No. 3 in to let her jump in and that the speed with which the Lusitania was going down at that time drew the boat into the side and that they could not keep her out and that the head of the davit caught the side of the boat and turned it inboard and Boat No. 3 was lost.

Boat No. 5. Hennesey, an A. B., who had been special lookout in the crow's nest, testified that a boat which he thought was No. 5 was blown to pieces by the explosion (Com. p. 199).

Sikking, boatswain's mate, who had been in the Cunard service for 25 years, testified that his boat was No. 5; that it had been damaged by the explosion, and that he assisted in getting the other boats out (Com. p. 204).

Boat No. 7. Mr. Bowring said of a boat which he thought was No. 7 that he did not think she could get away from the ship, that the davits were in the boat when he saw her; that he jumped overboard and swam when that side of the deck was not more than eight or ten feet from the water and as he looked back he thought this boat could not get away. (Min. p. 482).

Mr. Lauriat testified that he went to a boat which he thought was No. 7 (Min. p. 106). He said that the boat had been lowered and that as the steamer sank the boat listed in the water and the falls fouled—"The boat was caught by the forward davit. We cleared the after fall and swung out the stern but we could not get the bow out in time and the davit caught the bow of the life-boat and took it down." (Min. p. 96). This corresponds with what Mr. Bowring observed.

It is probable that Sikking's testimony (Com. pp. 204-207) referred to this boat. After he found his own boat, No. 5, damaged, he assisted in getting other boats out (Com. p. 204). He said that the reason the boat got underneath the steamer was "She was handled right enough, it was the people trying to get into the boat and ship going down like that, that was drawing her in all the time" (Com. p. 207).

Boat No. 9. Mr. Lewis testified that No. 9 was lowered to the water safely and unhooked,

but he could not say whether it got away safely. There were women and children in it (Min. p. 617).

Boat No. 11. Leslie N. Morton, an A. B., testified that he went to his own boat, No. 13, (Wreck Inq. Q. 433) and assisted there until he found that the boat was ready for lowering away and then went to help the next boat, which was No. 11, (Q. 440), that he helped fill No. 11; that the people in it were chiefly women, but some men and some children (Q. 442-444). He then saw his brother in a boat down alongside the ship, that is, "in No. 1 or No. 2" (mistake for No. 3 as No. 2 was a port boat). He then goes on to state what happened to Nos. 1 and 3, which corresponds to the statement of his brother, J. C. Morton, referred to above in connection with those boats. Morton also testified that when No. 11 was being lowered the list was heavy and the boat was swinging far from the ship's side (Q. 498) and it was a long jump for the ladies, as much as six feet (Q. 500). Mr. Lewis also tells of being at No. 9 or 11 and speaks of the difficulty of loading (Min. p. 614).

Roper, a seaman who had been on the "Lusitania" for about five years (Min. p. 425) testified that after aiding at boat No. 13, he went to No. 11. He was supposed to take the after fall, but it was too late for the water had made the boat deck, so it was just a case of cutting her and letting her break away. The boat was filled and got away from the ship and Roper went away in her; she got clear all right and afterward picked up some people from the water. No. 11 had about ten people in her when she reached the

water but took on others afterward until she had from seventy to seventy-five (Min. p. 429).

Mr. Lauriat saw No. 11 at Queenstown (Min. p. 661).

Boat No. 13. Leslie N. Morton, A. B., belonged in this boat and went to it after the torpedoing. (Wreck Inquiry Q. 433). He knocked off the patent screw at the after end of the boat and released the boat from the davit falls and she was all ready for lowering away aft (Q. 438). There was someone in the fore end of the boat doing a similar thing, and when No. 13 was ready for lowering away Morton went to No. 11 as stated above. He stated that none of the ship's company got into No. 13, other than those who, according to regulations, were attached to it. That all of the men were there that were supposed to be there, except two who were in the baggage room; that there was no muddle on the part of the crew and that everything was done clearly and in the right way as far as he could see. (Q. 482-485).

Mr. Bowring states that there was an officer at boat 13 (Min. p. 481).

Mr. Jones, First Officer, (since drowned) testified that he was lowering 13 and 15. That No. 13 got away first with 65.

Parry, an A. B., who had been in the Cunard service for eight years, belonged in boat 13 and went to that boat. (Com. p. 212).

Mr. Lewis, 3rd Officer, testified that as his boats were getting away he went aft and helped Mr. Jones lower his boat.

Mr. Chisholm, Second Steward, got into No. 13 and took charge of it. He said he had one sailor and four or five stewards. He was asked—

“Were stewards people who could manage boats?
A. Yes.” (Com. p. 358).

Roper testified that he went to No. 13, that the passengers were just starting to get in and that they had some trouble in getting the ladies in as they didn't like the idea of getting in, but they did get in as many as the boat would hold and he then took the forward fall. (Min. p. 227). Mr. Lewis or Mr. Jones was looking after the boat and when Roper got orders he lowered away and the man at the other end lowered and the boat got away safely full of people (p. 428).

Mr. Lauriat saw this boat at Queenstown (p. 661).

Boat No. 15. Mr. Jones, First Officer, testified that No. 15 was his boat and he went to it (Wreck Inquiry, Q. 903-904) and commenced to fill her with passengers (Q. 905). When he got to his boat the ship had between 30° and 35° list (Q. 912). He testified that he was a sailor used to walking in any kind of conditions but when he reached his boat he could not stand on the deck—he had to hang onto the rail (Q. 916). He put on board of No. 15 over eighty people (Q. 921) and lowered her down (Q. 922). After he had lowered No. 15 he went down the fall himself a few seconds afterwards. He went off with No. 15 (Q. 922) and transferred some of his passengers into an empty boat and then both 15 and the other boat went back and then he put his passengers on board a fishing smack (Q. 932) and went back to the scene of the wreck and collected some more people.

Mr. Jones said that he had difficulty in lowering the boat (Q. 1010) because there were over

eighty people in her (Q. 1011) but they lowered her down to the water in safety (Q. 1019).

Mr. J. F. V. Jones, Chief Steward, testified that he was engaged at the after end of No. 15 and that she got away safely from the ship filled with passengers (Wreck Inquiry Q. 1326-1328).

Thompson, an A. B., who had been following the sea sixteen years, testified that he got into No. 15 and that the list was very great; that it was not possible to stand on the deck, and that so far as he could see all the passengers had left the boat deck (Com. p. 219).

Mr. Readdie, a passenger, testified to noticing a young lady trying to make her way forward on the starboard side (Min. p. 466) and he assisted her. He said it was very difficult to walk on the deck and the young lady had to hold the rail alongside of the deckhouse to keep her feet. He put her into a boat and he eventually got into the boat, which was safely lowered. He thought the boat was either 15 or 17 (p. 467) and as 17 met with an accident it was undoubtedly this boat.

Mr. Lauriat saw this boat in Queenstown.

Boat No. 17. Mr. J. F. V. Jones, Chief Steward, testified that he went to boat No. 17 because he thought he was needed there (Com. p. 276, Wreck Inquiry 1320). No. 17 was down by the head; the line had evidently run through the block and they hoisted it up.

Thompson, A. B., testified that he had been working on No. 19 when the boatswain came along and relieved him and he went to No. 17 and took the after fall. There was a great crowd of people about. They finally got the boat filled and got orders to lower away. Thompson said he had difficulty in lowering away the after fall, because

of "the list of the ship and the people crowding on top of me. I was in danger of being pushed over the side by the crowding behind me * * * I put my feet against the davit and my back against the collapsible boat and lowered away in that position." The many people between him and the forward davit prevented him from seeing who was at the forward fall, but they began to lower away and at the other end also and they both began to lower and lowered steadily. The boat got below the deck and up to that time the operation was all right and then the forward end of the boat suddenly dropped (Min. pp. 679-680). In some manner the fall got away. Then Thompson immediately let go his end in an effort to equalize the boat, but this was not successful and the boat dived into the water bow first.

This is probably the boat as to which Mr. Hardwick testifies though he says it was No. 19, but No. 19 was successfully lowered (Min. p. 333). Mr. Adams, a passenger, probably referred to this boat in his testimony (Dep. p. 12).

Mr. Tootal, a first class passenger, testified that he got into a starboard boat which was hanging out from the ship's side about five feet (Wreck Inquiry Q. 1173): "They started to lower us when some other people jumped in and the man who was looking after the fore davit ropes could not control them. I think he must have let go of them by accident and the boat was tilted forward like that and we were all thrown into the water" (Q. 1177). Mr. Tootal said the boat he referred to was the aftermost boat on the starboard side (Q. 1171) and this no doubt was No. 17, because it appears from Thompson's testimony (Min. p. 679) that No. 19 (which had been the aftermost starboard boat) was successfully launched and got

away before they started to lower No. 17, so when Mr. Tootal got into No. 17 it was in fact the aftermost boat on the starboard side, and his account of what happened accords with the testimony of other witnesses in respect to this boat.

Just what it was which caused the forward end of boat No. 17 to drop nowhere appears from the testimony, but it does appear that the lowering of the boat was made very difficult by reason of the list of the ship and what Thompson describes as "the people crowding on top of me—I was in danger of being pushed over the side." It must have been a matter of great difficulty for even the most skilful man to lower a boat from a deck which was at an angle of 30° or more, with such a crowd almost on him and almost pushing him over. Thompson, who has since obtained his Second Mate's certificate (Min. p. 670) testified at the trial, and the Court will be able to judge from a direct impression as to his character and capacity. He has since been torpedoed twice.

Boat No. 19. Thompson testified that before going to No. 17 he went to No. 19 (Min. p. 678)—"That boat was pretty well loaded with people when I got to it and a man was at the after fall and nobody at the forward fall, so I took the forward fall and we began to lower away together—the boat would be filled with people. We got it about half way down and the boatswain said—'I will take that fall'—I think it was his station, so I gave the fall to him and he continued to lower the boat until it was successfully launched, and the boat was detached when it got to the water and cut away." The boat was full of people (Min. p. 679).

Mr. Lauriat saw No. 19 at Queenstown.

Mr. Readdie, a passenger, testified to being at a starboard boat but he could not remember the number (Min. p. 465). By referring to the rigging plan he thought it was No. 19 but evidently the boat he referred to was 17, for what he says accords with the testimony given by a number of witnesses as to 17. That is, Mr. Readdie says—"One of the tackles either stuck or else the sailor held on to it and the other end was allowed to run through and the result was that the boat tipped and threw all the passengers practically as far as I could see into the water." He said that the end that went down was the forward end (Min. p. 465).

Mr. Hardwick, a passenger, testified to being in one of the starboard boats, the bow of which dropped. In one answer he said that it was "the last boat, and the next to the last boat," on the starboard side. (Min. p. 324). Later on, he seemed disposed to identify the boat as No. 19, but seems not to have been very clear about what he observed, for he testified that the "Lusitania" was heading away from the Irish coast. (Min. p. 334). What Mr. Hardwick said, however, as to his experience in the boat entirely fits the case of boat No. 17. He was asked—"Q. Which end of the boat was it that dropped? A. The bow. Q. You were spilled out at the forward end? A. Well, she didn't go down as fast as we were lowering it and the chap that had the halyard fastened to the bow dropped it—so it was not a jump but you couldn't stay in." (Min. p. 333) This evidently applies to the boat Mr. Hardwick originally referred to as the next to the last boat on the starboard side, which is No. 17.

SUMMARY AS TO BOATS.

Of the starboard boats, one (No. 5) was ruined by the explosion; one (No. 1) was lowered by the seaman in charge of it, but the headway of the ship was so great that it drifted under, and came in collision with No. 3 and no passengers could get in it from the ship, though passengers were afterward picked up by it; two boats (Nos. 3 and 7) were successfully launched and filled with passengers, but as the "Lusitania" turned over the davits caught in these boats and pulled them under; five boats (9, 11, 13, 15 and 19) were lowered and got away safely, and eventually No. 1 also did. In one boat, No. 17, the forward fall slipped as above described allowing that end of the boat to drop.

As to the port boats, we know that one was lowered to the water and got away safely, and that another, though safely lowered, was so badly injured that shortly afterward it filled. As to the other port boats, they either could not be lowered at all by reason of the list, or, if they were started down the ship's side, they broke away from the falls either at bow or stern on the way down or were in a wrecked condition when they reached the water. Passengers frequently seemed inclined to say that this breaking away from the falls was because the men in charge of the falls had let the rope run, and an observer who was not leaning over the rail so that he could see just what was happening in the boat being lowered might readily get this impression. But a more careful study of this evidence as to the port boats indicates that the disasters to these boats were for the most part, if not altogether, caused by their catching on the

rivet heads as the boats went down, thus inevitably wrecking the boats to a greater or less extent. For example, as above noted, Mr. Baker, who had said of one of the port boats—"I saw that boat run away because the man at the bows could not hold the falls." (Wreck Inq. No. 1795) went on to say that when he looked over the side to see what had happened, he found that the stern post had been wrenched away from the sides (No. 1796). This shows the difference between inference and careful observation or technical experience. This situation of the port boats was well epitomized in Capt. Turner's testimony. He was asked as to the port boats—

"Q. As they were being lowered did anything happen to any of them?

A. They tore on the ship's side and spilt the people out and tore the bottoms out of some of them" (Com. p. 57).

As a matter of mechanics, it is plain that as these round-bottomed boats were being lowered down the inclined plane formed by the ship's port side, if the boat caught on the projecting rivet heads, as it inevitably would, it would tend to roll over outboard, and that this rolling might easily spill the passengers out of a crowded boat. And then, if the boat itself was so badly injured that one of the falls gave way, it might easily be supposed that by the fault of a man at a fall it was the letting go of the fall which caused the disaster, while the listing resulting from the explosion would be the real cause.

COLLAPSIBLE BOATS.

The testimony and diagrams of the ship show the familiar fact that the collapsible boats were on the deck under the open life-boats and were intended to be lifted and lowered by the same davits which lowered the open boats after the open boats had gotten clear of the ship (Mr. Peskett, Com. p. 9). As shown above, there was not sufficient time to get the open boats away before the ship sank. Clearly, it was the duty of the officers to get the open boats away before giving attention to the collapsible boats. As Mr. Pierpont testified: "it was a question of time" (Com. p. 326).

These boats were designed and arranged to float free if the ship sinks before they can be hoisted over (Mr. Peskett, Com. p. 10). And we know that they were cut loose (Com. p. 207, p. 228) and that some people were saved on these boats (Com. p. 231). Mr. McConnel gives some particulars of this (Com. p. 158) also J. C. Morton (Com. p. 179), Parry (Com. p. 213) and Davis (Com. p. 237).

GENERAL COMMENT ON CONDUCT OF THE CREW.

Under war conditions it is difficult to produce in a court in the United States witnesses who are following the sea and many of whom are in the merchant service or military service of Great Britain. This made it necessary to take much of the testimony in England, but so far as was practicable officers and members of the crew have also been produced before this court, so that the court might see these men and form its own impression as to their character and ability.

In view of the difficulties which hampered the

officers and crew after the explosion, it is not surprising that passengers, especially some passengers who were not familiar with maritime matters, should fail to make allowance for these difficulties. On the other hand, some experienced travelers on the "Lusitania" seemed to have been impressed with the manner in which the crew performed their duties. For example: Mr. Grab, who was a passenger and a claimant, and who had crossed the ocean many times (Min. p. 372) said of the crew, "They were doing the best they could—they were very brave and working as hard as they could without any fear; they didn't care about themselves. It was very admirably done. While there was great confusion, they did the best they could." (Min. p. 383).

Mr. Pierpont, a passenger, testified to the same effect (Com. p. 322 and p. 328).

Mr. Lasseter made a statement on this subject reading: "I have nothing but the highest praise for the crew, especially the stewards." His mother, who was also a passenger and a witness, at the Wreck Inquiry agreed with this. (Wreck Inq. Q. 1964, 1965).

Mr. Bowring, who has been in the steamship business for twenty-five years, gave much testimony as to the work of the crew. His testimony on this general subject may be summarized in the following statement which he made: "I saw no sign of panic on the part of the crew; they all seemed to be doing their duty and doing it well." (Min. p. 480).

It would appear from the testimony of certain passengers that they did not consider stewards to be members of the crew so far as regards their ability to serve in the boats.

As opposed to this view, the Chief Steward testified—that in employing stewards they were examined as to boat drill (Com. p. 278). He further said: “The stewards are assigned to boats and they have boat drill two or three times on the voyage and they have competitions amongst themselves. As a matter of fact, among the “*Lusitania*” crew I believe on the third previous voyage the stewards at the time won the championship of the ship against the sailors and firemen.” He went on to say that they had regattas in which the stewards took a part and that three voyages previous they had won the championship. (Com. p. 274).

Mr. McConnell, a passenger, testified, “Nothing could have been better than the stewards. They were just helping as if it was the most common occurrence, and they were prepared for it in every respect” (Com. p. 155). See also testimony of Mr. Chisholm (Com. p. 358) and of Mr. Stockton (Com. p. 364).

It will appear from the testimony of the Chairman that on the Ship’s Articles there are “seamen and ordinary seamen”; that it was within his knowledge that the male stewards are efficient in handling the boats, and that it is part of the business of the company to see that their stewards are capable of handling the boats. He also testified that the 314 men in the Engineering Department of the “*Lusitania*” had experience in the working of boats (Com. p. 146). See also Mr. Lewis (Com. p. 188). The Boatswain said “I do not think we could do any better if we had twice as many men” (Com. p. 244).

In his examination before Wreck Commissioner’s Court, Capt. Turner had commented

somewhat unfavorably on the practice which the crew had had in seamanship. To make the matter clear he was re-examined on this subject before the Commissioner. (Com., p. 100) and it would appear from his testimony that in instituting comparisons he had in mind the old-fashioned sailor-man of the days of oak and hemp. He was referred to a statement in Lord Mersey's report which read—"and I am satisfied that the crew behaved well throughout," and Capt. Turner was asked, "Do you think they did?" A. "Yes. They worked very well."

"INSTRUCTIONS" FROM THE ADMIRALTY.

Throughout this case reference has frequently been made to "instructions" from the Admiralty, but this is an incorrect description of the Confidential Memorandum of 16th April, 1915, relating to zigzagging. An examination of the communications from the Admiralty (W. T. T. 3) will show that the Memorandum as to zigzagging was merely in the nature of suggestions and advice, or a statement of what manoeuvres had been found efficacious. This meant that the master of a merchant vessel while having this advice in mind was still bound to act in any particular situation as he thought wise under the circumstances. Or, as the Wreck Commissioners Court reported in this case: "The advice given to him, although meant for his most serious and careful consideration, was not intended to deprive him of the right to exercise his skilled judgment in the difficult questions that might arise from time to time in the navigation of the ship" (Report, Wreck Inquiry, p. 9). This is a statement by an official

body—the Wreck Commissioners Court—as to the significance of the Admiralty instructions and that Court was acting within the sphere of its duty in construing those instructions. The letter of the Secretary of the Admiralty refers to these communications as “confidential instructions, advices or notices (Com. p. 164). Captain Manley testified on the subject and said “ I have departed from them (Admiralty instructions) since the war broke out” (Com. p. 342). The importance of giving the Captain power to exercise his discretion as circumstances might demand will appear in the Chairman’s testimony (Com. p. 106, 119). The specific orders or suggestions will be considered separately.

ZIGZAGGING.

For the past three years the civilized world has bestowed careful and anxious attention on methods for avoiding the submarine, and this art of avoiding and combating the submarine has been slowly developed by study and experience, but in May, 1915, that development was just starting, for the Germans were just commencing their attacks on unarmed vessels. In order to pass on Capt. Turner’s conduct in May, 1915, it is therefore necessary to detach the mind from present conditions and to recall the conditions then existing.

Zigzagging was not then practiced by the masters of merchant vessels and did not come into practice by them until at least some months later. (Capt. Taylor, Min. p. 907, 911-915). (Capt. Fear, Min. p. 920, 923). The science of zigzagging was not then developed and such efficiency as it then had was not recognized by the masters of mer-

chant vessels. It will be seen later that zigzagging as then understood was better adapted to an armed naval vessel whose destination is not known than to an unarmed passenger vessel whose destination was well known.

The Memorandum of 16 April, 1915 (W. T. T. 3) issued by the Admiralty on this subject was mainly a statement of what the experience of war vessels had been. It did not purport to be an order and Capt. Turner was therefore, required to act as circumstances dictated. Another communication from the Admiralty advised him to give headlands a wide berth. Now, it will appear from the chart that the Fastnet was the first headland near which he passed, and he followed the Admiralty advice by giving this a very wide berth—about twenty-five miles (Wreck Q. 70).

The Admiralty had also advised him to take a mid-channel course (W. T. T. 3). At 11:25 A. M. when off the Fastnet he had received a wireless message which was especially intended for him for it read “make certain ‘Lusitania’ gets this.” This message stated that there were submarines twenty miles south of Coningbeg Lightship. Capt. Turner accordingly decided that after passing the Fastnet he would change his course inshore. He was asked what he would have done if the vessel had not been torpedoed and he answered: “I would have hauled right away close up to the land and gone close to the Coninbeg Lightship * * * Q. What had influenced you in coming to that decision? A. Because there was a submarine reported in mid channel twenty miles south of Coningbeg; that is, mid channel.” (Com. p. 59).

In the hour and a half which elapsed before the

torpedoing Capt. Turner changed his course twice, making an angle of about 30° each time, and when the torpedo struck him he was carrying out his plan by working toward the shore and was ascertaining his exact location by taking a four-point bearing.

We thus know that Capt. Turner had definite reasons for doing what he did; that is, he went twenty-five miles off the Fastnet because advised to do so. He was working inshore because advised of the submarines in mid-channel ahead. He was taking a four-point bearing to get his location and he had in fact changed his course twice, making long legs and sharp angles. The legs he was making were longer than those advised by the Admiralty for naval vessels, but, as will be seen below, this was probably the safest method of zigzagging for the "Lusitania." In view of the definite and good reasons which led him to do what he did, he cannot be censured because he did not practice in a different way the then undeveloped and almost unknown art of zigzagging.

Since May, 1915, zigzagging has been the subject of study and of experiment and of much debate. One of the results has been to bring out the difference in conditions between a naval vessel and such a vessel as the "Lusitania." A naval vessel may be going to any port or no port, consequently when a submarine sights such a vessel the submarine commander may be really deceived by a change of course on the part of a naval vessel. In the case of the "Lusitania" it was quite different. Any sailor could recognize the "Lusitania" as far as he could see her and would know about what her course must be to reach her home port. Any change from the normal course would be recognized as merely an

attempt to deceive and it would be known that the vessel must soon come back approximately to her normal course.

While the "Lusitania" was so far from the submarine that the submarine commander could not see her, it obviously could make no difference whether the "Lusitania" was taking a straight or a zigzag course. For, the submarine being at some unknown point ahead, there would be as much chance of coming within sight of that unknown point by following one course as by the other.

If when a single submarine first sighted the "Lusitania" the submarine happened to be so far either to port or to starboard of the course of the "Lusitania" that the submarine could not get within firing range then, obviously, the "Lusitania" would escape. And, in that event, it would make practically no difference whether the "Lusitania" was following a straight, or a zigzag course. For with the submarine far to one side a change of course would not be as apt to bring the "Lusitania" in range as to take her out of range.

If, however, the "Lusitania" was sighted by a submarine which was so nearly in her course as to be able to get within range, then the situation would be presented (as regards zigzagging) which was discussed at length by Mr. Spear at the trial. It was there shown by Mr. Spear (Min. p. 785 to 789) that if, under such circumstances, the "Lusitania" had zigzagged *making relatively short legs*, the submarine even while traveling submerged could come within firing distance.

There is, perhaps, a possibility that if the "Lusitania," having the submarine ahead of her, had made sharp angles and long legs such as Capt. Turner was in fact making, she might get so far off

the course anticipated by the submarine commander as to escape. While the chances in her favor, if she made such long legs, might not be great, a course of long legs and sharp angles would give her the best chance to escape. For, if the submarine commander believed her to be zigzagging and observed that she was taking a course which would take her out of range, but which was at a decided angle from her normal course, he would probably plan his own movements on the supposition that she would later zigzag back nearer to normal. And, if she failed to live up to his expectation but continued for a considerable time on the course which was taking her away from the normal, she might pass out of range.

We have been considering the problem of avoiding a single submarine. But from the fact that a third torpedo was fired at the "Lusitania" from the other side, it is probable that the Germans had a cordon of submarines. And it was shown in the testimony that a "target vessel" approaching a line of submarines is safest when taking a straight course, because by zigzagging up to such a cordon she will be approaching it at an oblique angle, and this will bring more submarines within range of her than would be the case if she approached at a right angle to the line of submarines (Min. p. 778).

Are we then to conclude that zigzagging offered no protection whatever? Mr. Spear was practically asked this question on cross-examination (Min. p. 901).

Before noting his answer, it is worth while to consider the qualifications which he had for answering the question. After graduating at Annapolis in 1890 and serving twelve years in the Navy, he took up the work of designing and con-

structing submarines in connection with the company which is practically the parent of submarine construction (Min. p. 751). After testifying to his work in constructing submarines and to his observation of submarine construction abroad, he was asked in cross examination:

“Q. You have made a life study of torpedoes and submarines?

A. Yes.

Q. I don't want you to be too modest, but do you think anybody has any more knowledge on the subject of torpedoes and the construction of submarines than you have?

A. I think there are a number of people who have more knowledge of torpedoes than I have.

Q. But not about the construction of submarines?

A. I don't think there is anybody who has been in as good a position as I have been to have a comprehensive knowledge of it. I ought to know about it, if I don't” (Min. p. 799, 800).

As regard the practical side of the actual operating of submarines Mr. Spear testified to having made between a thousand and two thousand submerged runs in submarines (Min. p. 783).

This witness was produced by the petitioner so as to give testimony from the standpoint of the submarine. That is, from the standpoint of a man who had devoted many years to making the submarine a success. His answer as to the efficacy of zigzagging is therefore entitled to great weight, and when questioned as to this, he said that the best course for the commander of a target vessel

“is to steer such a course as will make it most difficult for the submarine commander to anticipate where you are going to be next; in other words *an irregular curved course with the ship always under rudder so that at no time except for some very short interval of time is she pursuing a straight course*; that would, in my judgment, be the most effective way to make it difficult for the submarine to carry out the first part of the attack—generally termed the approach—that is, to get within proper distance. Of course, any such course might lead you within torpedo distance when a straight course would not. But broadly speaking, taking the chances altogether, I think that *a continuously varying course* would probably be the most effective means you could adopt” (Min. p. 902).

This is modern zigzagging and obviously it adds to the problems and difficulties of the submarine commander. When a “target vessel” is taking one of these modern curved zigzagging courses, she keeps turning on longer or shorter curves all the time. It is quite obvious (and the witnesses so testified) that a submarine commander in planning to get within firing distance must carefully observe the *direction* the “target vessel” is taking. But it is obvious that if she is taking one of these curved courses, the submarine commander will soon find out that he cannot compute with any accuracy what her direction is to be, since it is changing all the time and the only course open to him is to keep her under observation continuously or at very short intervals. And when he gets to about within firing range or within range, he must keep her in constant observation, and, in order to fire his torpedo effectively, *must get*

within much closer range than would be necessary if he knew that the vessel was on one of the straight legs of an old fashioned zigzag course.

This necessity for coming close to the "target vessel" all counts against the submarine, *for in many cases it will enable a "target vessel" to see the submarine*, and then either one of two things will happen. (1) If the "target vessel" is armed, she will open fire on the submarine or try to ram it; or (2) The "target vessel" will throw her helm hard over and go directly away from the submarine. And a vessel going directly away is not only very difficult to hit because her stern alone presents so small a target, but the wash from the screws may deflect the torpedo.

It will be seen that the arming of "target vessels" has much to do with protecting them against submarines and that arming plays an important part in the efficacy of the modern zigzagging, so it is not surprising, as the Admiralty Memorandum of 16th April, 1915 states, that armed naval vessels may have found zigzagging efficacious as far back as that date. It was proved that the "Lusitania" was unarmed and the Court will perhaps take judicial notice that this was true of most merchant vessels at that time, although afterwards merchant vessels were armed for defensive purposes.

It may be said that part of the foregoing statement relates to the development of the art of zigzagging since May, 1915, and that although permissible as argument it could not have been offered on the trial as evidence. But it is referred to because Capt. Turner cannot now be censured for failing to adopt an old fashioned short-leg zigzag which later experience has shown would

not have helped an unarmed vessel like the "Lusitania", especially as the testimony shows that after passing the Fastnet he was taking a course of long legs and sharp angles which was probably the best method of zigzagging for his vessel.

Mr. Spear testified that steering a curved course was unknown in May, 1915, as far as he knew (Min. p. 904).

GIVING THE HEADLANDS A WIDE BERTH.

It appears from the chart (W. T. T. 4) that the Fastnet was the first point on the Irish coast which a vessel bound from New York to Liverpool would have to approach closely. The normal course was to pass close to the Fastnet and even inside of it (Com. p. 49).

Having in mind the advice of the Admiralty to give the prominent headlands a wide berth, Capt. Turner as above noted passed about 25 miles off the Fastnet, so far out that he could not see it. (Com. p. 49). As noted above, he had received the wireless message at 11:25 A. M. relating to submarines 20 miles south of Coningbeg Light Vessel, and had decided by reason of this message, to haul close up to the land and go close to Coningbeg Lightship (Com. p. 59). He was carrying out this plan when the vessel was torpedoed. It cannot be disputed that he gave the Fastnet a wide berth and then started to work inshore so as to carry out a definite and proper plan of avoiding the submarines reported in mid channel ahead of him. Under these circumstances, it is quite immaterial whether he was giving the Old Head of Kinsale a wide berth or not, for he had decided that his safest course was to go inshore. General Admiralty advice as to

giving headlands a wide berth was plainly of less importance than the explicit Admiralty advice which he had just received as to the presence of submarines in mid channel ahead. In carrying out his plan it was proper for Capt. Turner to get his exact distance from the shore. Whether he did this by a four point bearing or a two point bearing or a cross bearing is quite immaterial here. There was evidence that by reason of haziness and the difficulty in seeing two conspicuous points on the shore the most accurate method was by the four point bearing.

STEERING MID-CHANNEL COURSE.

An examination of the chart will show that the "Lusitania" was still in the open sea when she was torpedoed. From the Old Head of Kinsale across to the Scilly Islands is about 140 miles and there is no part of those waters that can properly be called a channel (Com. p. 138, 139). The first channel the "Lusitania" would enter is St. George's Channel, commencing, say, between the Smalls and Coningbeg Light (Com. p. 139). When the "Lusitania" was torpedoed, she was almost 100 miles from the entrance to that Channel, and as seen above, was shaping her course inshore to avoid the submarines reported in mid-channel there (Com. p. 59).

APPROACHING PORT.

The Admiralty instructions of Feb. 10, 1915, said: "So far as is consistent with particular trades and state of tides, vessels should make their ports at dawn." The same instructions also said:

“The danger is greatest in the vicinity of ports.” (W. T. T. 3). The Chairman of the Cunard Company, Sir Alfred Booth, was questioned as to this subject as follows:

“Was the question of when the ship should arrive at the Bar at Liverpool settled by you or suggested, or how was it left?— That was left in this way. It was one of the points that we felt it necessary to make the Captain of the “Lusitania” understand the importance of. “The “Lusitania” can only cross the Liverpool Bar at certain states of the tide, and we therefore warned the Captain, or whoever might be captain, that we did not think it would be safe for him to arrive off the bar at such a time that he would have to wait there, because that area had been infested with submarines, and we thought therefore it would be wiser for him to arrange his arrival in such a way, leaving him an absolutely free hand as to how he would do it, that he could come straight up without stopping at all. The one definite instruction we did give him with regard to that was to authorize him to come up without a pilot” (Wreck Inq., Q. 280).

The Chairman testified again to the same effect (Com. p. 108) and again (Com. p. 130).

Capt. Turner testified to the same effect as to his instructions to get to the Liverpool Bar “at such time as I could cross it without waiting outside the Bar for the tide” (Com. p. 65).

He also testified that he was carefully arranging the speed of the “Lusitania” so as to reach the bar at Liverpool without being detained there. (Com. p. 47). He was asked on cross-examination why he did not arrange his speed earlier in the voyage so as to pass these waters at maximum speed, and he testified in substance that he

did not know what weather he was going to meet, out was bound to anticipate that there would be fog off Ireland and that there proved to be less fog than he anticipated. So to reach the bar at dawn on Saturday, when the tide served, he had to fix the speed at 18 knots (Com. pp. 82-83-84-85).

The tide was high at Liverpool Bar at 6.53 Saturday morning, May 8 (Com. p. 311). Capt. Turner testified that he was planning to cross the bar at as early a time before that as he could get over without stopping, and he was, therefore, doing the best that could be done to follow these Admiralty instructions; that is, to enter port at dawn and to avoid the dangers which were greatest directly off the port.

It was testified that darkness was a considerable protection against submarines (Min. pp. 902-903). Capt. Turner was planning so as to take full advantage of this protection. The chart on which previous submarine attacks are noted will show that many of the attacks had occurred near Liverpool and off the Coast of Angelsea. Capt. Turner timed his course so as to get full advantage of the darkness in these waters. The time at which the tide would serve on Liverpool Bar was a fixed and unyielding point, and bearing in mind that he could not safely have reached Liverpool Bar earlier than he was planning to reach it, it will be seen that he was planning to make the best use of the darkness which could be made in passing the dangerous waters from the entrance of St. George's Channel to the bar at Liverpool.

OBEYING ADMIRALTY INSTRUCTIONS.

If the Court reads the report of the Wreck Examiners Court the following sentence will, no

doubt, be observed where referring to Capt. Turner, that Court says:

“His omission to follow the advice [Admiralty advice] in all respects cannot fairly be attributed either to negligence or incompetence.”

That Court does not point out in what respect Capt. Turner did not follow the Admiralty advice, but it is evident that this refers to zigzagging, for he did not make the short leg zigzag suggested in the memorandum of April 16, 1915. Evidently this is the interpretation put on the report in England, for the Chairman of the Cunard Company testified that he understood that this was what the report referred to and that he did not know of any other respect in which Capt. Turner had failed to comply with the Admiralty advice (Com. p. 145).

Whether Capt. Turner did what was best under the circumstances in reference to this matter of zigzagging as then understood has already been discussed.

Capt. Turner made it entirely plain that he *intended to follow the Admiralty instructions and did follow them as far as he could*. He was asked on cross examination (Com. p. 70):

“Q. Did you feel that it was your duty to obey the instructions of the Admiralty in so far as they were conveyed to you?

A. Yes, consistent with the welfare of the ship.

Q. You realized, did you not, that the Admiralty having better means of knowing where submarines might be encountered than you could have the course which prudence

dictated was to follow out the admiralty instructions?

A. Yes, that is right.

Q. In some particulars I think you claim that you did follow their instructions?

A. Yes.

Q. And I think to be equally frank you admit that in other particulars you neglected their instructions and pursued your own course?

A. I do not admit anything of the kind.

Q. Did you carry out the advice given you by the Admiralty in every particular?

A. As far as possible, yes. As far as it was consistent with the welfare of the ship."

Again (Com. p. 71) still on the cross examination he was asked:

"Q. You have admitted to me that while in some respects you followed out literally the advice of the Admiralty in other respects you used your own discretion and differed from the advice of the Admiralty.

A. That may be some people's idea—it is not mine. I considered I followed out all instructions to the best of my ability—what I thought were instructions.

Q. You also say that you followed or were prepared to follow out all the instructions of the Admiralty in so far as were consistent with the safety of the ship?

A. Yes, that is right."

Being further questioned (Com. p. 71) as to what instructions he thought inconsistent with the safety of the ship he referred to the advice about mid-channel course which he could not follow on account of the message indicating that there were submarines off Coningbeg.

A motion has been made by the claimants in reference to certain communications from the Admiralty which, for reasons affecting the public interest in connection with the war, Capt. Turner was not allowed to disclose.

It is first of all a question whether the claimants are entitled to demand the production of such statements by interrogatory. Then it does not appear why the petitioner should produce these communications rather than the claimants. The difficulty in the way of the production grows out of the war and of the refusal of the British Admiralty to have them disclosed, and as the United States and Great Britain are Allies the same considerations which stood in the way of the production of these communications in England equally stand in the way of their production here, and it is just as possible for the claimants, who are represented by able counsel in England, to apply to the Admiralty to release this information as for the petitioner to do so. The Court may be disposed to note that the public authorities may insist on keeping secret information which has little bearing on the public interest and still less on the issues of the proceeding.

Capt. Turner was being questioned as to the disregarding of any Admiralty instructions and was asked:

“Q. I wish you would answer this because it might save me the trouble of asking for other Admiralty instructions; did you with regard to any other single instructions or advice?” [that is, did he disregard it]

He answered—

“Not, in my opinion, I did not.

Q. Or advice from the Admiralty take it

upon yourself to come to a different conclusion from what the Admiralty had come to?

A. No, I did not.

Q. Then may I put this to you again—Have you any objection in view of that answer you have given to bring here and submit to the learned examiner for the information of the courts in America the whole of the instructions which you received?

A. I have no objection whatever, but the Admiralty have and until I get their permission I will not give it.

Q. Subject to the permission of the Admiralty being got you have no objection yourself whatever?

A. No, no objection whatever subject to their permission” (Com. pp. 72, 73).

The Chairman of the Cunard Company was asked:

“Q. Have you any desire if you can get leave of the Admiralty authorities to keep back any instructions or advice that were in fact sent your Company or to your masters?

A. I would much rather they were all disclosed.

Q. Is it your wish that they should be disclosed?

A. Absolutely.

Q. Will you make it your business either yourself or through your solicitors to see that a further application is made to the Admiralty to get permission to disclose all instructions or advices which have been received?

A. Yes” (Com. p. 148).

The Secretary of the Admiralty in his letter of June 21, 1917, (Exh. A. P. P. 1) says of the memorandum which was submitted to the Court—

“I am to state, however, that the memoran-

dum was prepared with the object of including and that it does in fact include all the instructions, advice and notices given to the 'Lusitania' which are relative to the issues raised as to the navigation of the vessel and further that it does include all the wireless messages which were sent by or on behalf of the Admiralty to and received by the Master of the 'Lusitania' on her last voyage to New York."

As showing of how little importance this whole subject is the Chairman testified in reference to these undisclosed instructions—"I think it is a great pity there should be any mystery about it but I think it is absolutely immaterial to the issue" (Com. p. 125).

The Chairman was examined at length as to the method by which communications from the Admiralty were passed on to the Masters of their vessels, and it will appear from his testimony that these communications were made directly from the Admiralty to the master and that the contents were not known at the time to the Cunard Company (Wreck Inq. 276-279).

SPEED.

In order to make it possible to run the "Lusitania" at all, she was run at three-quarters of her boiler power, which meant a reduction in speed from about 24 knots to about 21, but even at this reduced speed, she was considerably faster than any other passenger steamer crossing the Atlantic at that time (Com. p. 46 and p. 104). This reduction of speed was partly for financial reasons, but also it was a "question of economy of coal and labor in time of war" (Com. p. 105).

The “*Lusitania*” was merely run to pay expenses. The Chairman testified—“We did not hope to make any profit and as a matter of fact, we did not make any profit.”

It thus appears that this ship was run to keep up a long record of public service, rather than in the hope of any financial profit from running the vessel. To claim that the speed was cut down by the Company in a sordid disregard of the safety of passengers is as far from the fact as the well known representations of the Germans to that effect.

This shutting off of a fourth of the boilers was not the cause which determined what the speed of the vessel was on May 7th, and when the circumstances which confronted the Captain on that day are considered it will be seen that this shutting off of those boilers does not present an issue here. From early in the morning and during the forenoon of May 7th the vessel was running through fog (Com. p. 46). The fog was a thick one and the officer on watch testified that they were taking soundings because of the fog (Wreck Inq. Q. 1429-1431). The engineer’s log indicated that this hazy weather continued to about a quarter of an hour before noon (Wreck Inq. Q. 1458). See also Com. p. 313. By reason of the fog, the speed had been reduced to about 15 knots (Com., pp. 46 and 82). The duty of determining what the speed ought to be in the fog obviously rested on the master (*La Bourgogne*, 117 Fed. 261, 270).

The ship was then off the Fastnet and the Captain had to fix the speed of the ship so as to avoid detention at the Liverpool bar, and we know from his testimony what his reason was for fixing the speed of the ship at 18 knots as he did. He was asked—

“Q. There was a reduction to 18 knots?

A. Yes.

Q. Will you tell me why it was that you reduced speed to 18 knots—what had you in your mind?

A. Had we not done so we would have arrived at the bar at a state of the tide when the ship could not go over and we would have had to lie outside waiting for the tide.

Q. When you speak of the bar do you mean the bar at Liverpool?

A. Yes.

Q. If you had gone on at your speed of 21 knots the result would have been that you would have arrived at the bar under such tidal conditions that you could not have got in?

A. We could not have got across the bar.

Q. The result of that would have been that you would have had to wait outside?

A. Yes.

Q. Having regard to the activity of submarines would it, in your view, have been a prudent thing to have been hanging about outside the bar?

A. Certainly not, we would have been a nice target for them.

Q. You had that present in your mind?

A. Yes” (Com. pp. 46, 47).

We know that the most dangerous place, so far as submarines were concerned, was off the Liverpool bar and that nothing could have been more dangerous than to stop or circle about off that bar (Com. p. 130). And it will be shown later that the diminution of the vessel's speed by a few knots had little, if any, effect as regards danger from submarines.

Capt. Turner therefore decided that in order to

avoid the danger of detention off the Liverpool bar he would fix the speed at 18 knots.

It is submitted that the evidence which is, or will be, referred to elsewhere in this brief shows that the captain was right in estimating the danger of detention at Liverpool bar as greater than any danger which might result from cutting the speed down to 18 knots.

If the ship had then been capable of making 24 or 25 knots, or even more, it would have made no difference, for the speed of 18 knots was determined by the distance from the Fastnet to Liverpool, and by the time which would elapse between noon of Friday and dawn on Saturday, both of which were fixed factors. To repeat, therefore, the proposition stated above, the shutting off of one-fourth of the boilers did not affect the speed of the ship after the fog lifted on Friday, and therefore, it does not present any issue in this proceeding.

If, when the fog lifted on Friday, it had been necessary for the "Lusitania" to make more than 21 knots in order to reach the Liverpool bar when the tide served at dawn on Saturday and if she had then been prevented from making a higher speed because certain boilers had been shut off then the shutting off of the boilers might present an issue. But that was not the case.

In view of the prominence which the claimants have given to this subject of speed, the petitioner has also offered evidence on that subject, and without conceding its materiality and merely for the sake of the argument, a summary of that testimony is presented as follows:

In considering this question we must bear in

mind that any actual question of speed is limited to small dimensions as regards this ship. If one could imagine a vessel able to travel 100 miles an hour or more, then such a speed would clearly be some protection against submarines. For, if a submarine did not happen to be close to firing range of the track of such a "target vessel" when she first sighted the "target vessel" the submarine could not change her position quickly enough to get within firing range before such a target vessel had passed. On the other hand, if the target vessel had a speed less than the submarine, that would be of the greatest importance. In this case the difference of speed caused by the cutting off of the boilers was a relatively small one. There was some evidence that the "Lusitania" had occasionally gone to 25 knots, but the Chairman testified that the cutting off of one-fourth of the boilers "meant a reduction of speed from an average of about 24 knots to an average of about 21 knots" (Wreck Inq. Q. 221).

The Chairman further testified:

"The 'Lusitania' being in fact the fastest ship that was running the difference between 21 and 24 knots was not material so far as avoiding submarines was concerned."

He was asked:

"Q. Would you say the difference between 18 and 24 knots was not material?"

A. It is very difficult to say where one would draw the line. No steamer so far as I know, of over 14 knots had been caught by a submarine at all" (Wreck Inquiry, Q. 245).

The expert testimony on this subject confirms the opinion of the Chairman.

Mr. Spear testified on this subject at considerable length (Min. p. 763-764-765-767 to 771 and 798). Mr. Spear's attention was directed to the testimony that a burst of foam was seen by the lookouts, and he was asked whether that was a characteristic of the discharge of a torpedo. He answered that it was. He was asked

“According to the testimony, this burst of foam was seen somewhere between 300 and 500 yards from the ship's side, in a situation forward of the bridge and the wake of the torpedo and its approach, as testified by the lookouts who first saw it, was direct on nearly at right angles. Would it have made any difference, in your opinion, whether the steamer was proceeding at that time at 18 or 21, or even 25 knots, so far as the danger of being hit was concerned.

A. No, it would not” (Min. pp. 767-768).

The witness then went on to explain a computation he had made on the subject, making allowances for various errors. He said that a blow in either the bow or stern might not be as serious, but that the vitals of the ship, that is. the engine and boiler section, were 520 feet long. As regards the margin of error which there could be and still have the ship struck in the vitals, Mr. Spear said:

“Assuming him (the submarine commander) to be firing at certain portions which he naturally would, he could make an error with the ship going 18 knots of 48% in his estimate of the speed, and he would still have struck the vitals of the ship. If she was going 21 knots he could make an error of 42% and with 25 knots he could make an error of 37% and still strike in what I have assumed to be the

vitals of the ship, being 520 feet of machinery space" (Min. p. 770).

He said:

"If you were within a comparatively short range, say within 500 yards, which is a very short range, of a very big target, it makes practically no difference what she was doing then, swinging or moving or doing anything else. Once you get into that contact with her it is almost impossible to miss her" (Min. p. 798).

In response to the question from the Court as to the difficulty of a submarine commander in estimating the higher or lower speed of a "target vessel" Mr. Spear said that he thought the percentage of error would not be more than 10% (Min. p. 765).

As to the distance of the submarine from the "Lusitania," Morton, one of the lookouts who saw her, said it was 500 yards (Wreck Inq. Q. 416-461), Mr. Myers, one of the passengers, said 300 yards (Min. p. 345) and Mr. Grab, another passenger, said 450 yards (Min. p. 378). It will appear from this that Mr. Spear was within the figures in estimating that the submarine was not more than 500 yards away.

The substance of Mr. Spear's testimony on this subject of speed was:

"Within practical ranges of speed for big ships once you are within range the speed is no defense at all for practical purposes. It is a very very poor one. There is no difficulty in striking a large target moving at a high speed from close range. It is almost as easy to hit it as it is to hit it moving at slow speed" (Min. p. 763).

A comment on this subject, which is practical, if not scientific, was made by Quinn, one of the lookouts of the Crows-Nest who saw the torpedo coming. He was asked as to the torpedo:

“Q. Was it coming straight, end on?

A. Straight, right correct for the ship. She could not have got clear had she been going 100 knots” (Wreck Inq. Q. 390).

In crossing the Atlantic the “Lusitania” had maintained a speed of about 21 knots (Wreck Inq. Q. 86). Early in the day on May 7th there had been fog and the speed was reduced to about 15 knots (Com. p. 47). After the fog cleared up and at the time the ship was torpedoed she was traveling at 18 knots. The reason why this speed was 18, instead of 21 knots, has already been explained. It was to take the maximum advantage of the darkness in traversing the most dangerous waters and to bring the ship to Liverpool bar at a time when she could cross without stopping.

As stated above, no German submarine had up to that time succeeded in attacking a vessel which was traveling faster than 14 knots, and Mr. Spear testified that the surface speed of a submarine was about 15 knots and the submerged speed from 9 to 10 knots (Min. p. 758).

It thus appears that a German submarine could not possibly have overtaken the “Lusitania.” Had this been otherwise, that is, had the submarine been capable of going faster than the “Lusitania”, then the element of speed of this “target vessel” would have been of great importance, and this is the sense in which we so often hear the remark that speed is an important protection against submarine attack, for, obvi-

ously, if the submarine is the faster of the two vessels she can follow her prey and choose her time of attack, even attacking after dusk when she can approach close to the "target vessel" without being detected.

We know that such overtaking was impossible in the case of the "Lusitania", and we also know from the testimony of the lookout and of two passengers that the submarine in question was not more than 500 yards from the ship. Special lookout were on duty and we know from the testimony that there were many passengers on deck at this time, but there is no suggestion in any of the testimony that the submarine was moving or was itself making any wake or disturbance in the water, although two of the claimants testified that the periscope was above water. From these circumstances it seems clear that the submarine was either able to reach a position which was nearly enough ahead of the "Lusitania" to enable the submarine to lie in wait, or else that it was one of a cordon of submarines which had taken their station across the course which the "Lusitania" would have to traverse, and that in either event the submarine had succeeded in getting into proper firing position early enough so that she did not have to move when the "Lusitania" came within range.

From a legal standpoint it is only permissible to consider the danger from the submarine which did, in fact, meet the "Lusitania", and from the testimony just referred to it appears that the "Lusitania" could not have escaped this submarine, even if her speed had been 25 knots.

We have here strong indications that several submarines were lying in wait for the "Lusi-

tanian". The testimony as to a third torpedo fired from the port side of the ship has already been referred to. In addition to this, the two wireless messages sent by the Admiralty on May 7th, and especially intended for the "Lusitania," both referred to "submarines" in the plural; that is, the message of 11:25 A. M. spoke of "submarines" last heard of 20 miles south of Coningbeg and the message of 12:40 P. M. spoke of "submarines" 5 miles south of Cape Clear (Exhibit W. T. T. 3). It thus appears that the submarines were hunting in company and not singly.

When one remembers what the cost of a torpedo is, and that when a German submarine in these waters had used the few that she could carry she would have to take a long and dangerous trip to her base for a new supply, it becomes apparent from the fact that the Germans from close range launched two torpedoes into the vitals of the "Lusitania" that they would be satisfied with nothing less than the destruction of the ship. And this plain purpose, coupled with the evidence we have as to more than one submarine, strongly indicates that at least two, and perhaps, a number of submarines were lying in wait. This has a bearing on any possible protection which an increased speed might have given the ship, for if several submarines were lying in wait across her path, it would make no difference what her speed was. That is, the same speed which would have taken her out of range of one submarine, would bring her within range of another.

But this discussion of what might have happened but did not happen, is really all speculation. The fact is that the "Lusitania" could not have escaped the submarine she did meet even if her

speed had been 25 knots and that fact was amply proved.

The claimants suggested that Capt. Turner could still have arrived at the Liverpool Bar not earlier than 4 A. M. and yet have made a higher speed than he did, provided he had zigzagged through all these waters so as to make the distance traversed by the ship long enough to use up the time gained by the faster speed. As already shown, Capt. Turner was probably doing as well as he could have done, so far as regarded the efficacy of zigzagging, as zigzagging was then understood. If then he had planned from dusk on Friday to dawn on Saturday, to pursue a zigzag course up through St. George's Channel and around Angelsea to Liverpool, and if by doing this he had used up the time which he would have saved by increasing his speed, he would to that extent have lengthened the distance where he was in danger of attack.

As testified by Mr. Spear, if a submarine could get near enough to the "Lusitania" to enable the commander of the submarine to see her at night, it would make practically no difference when the "Lusitania" was so sighted by a submarine which was close aboard whether the "Lusitania" was going 18 or 21 or 25 knots. Speed would be practically no protection with a submarine so near. Therefore, Capt. Turner's greatest safety between dusk of Friday and dawn of Saturday lay not in maintaining a high speed but avoiding if possible being seen by submarines, and the shorter his course the less chance there would be that some of the submarines lurking along those shores might see his ship.

DISTRIBUTION OF LIFE BELTS.

As noted above, the "Lusitania" carried life belts for all of the 1,959 persons aboard and there were 1,228 to spare (Exhibit F. M. 2, Com. p. 332).

The most natural and usual place for life-belts to be kept was in the staterooms. Many passengers testified to the fact that there were belts in their rooms, with notices showing how to adjust them, and no one testified that there were no belts in the rooms (Com. p. 287).

Several passengers testified that they did not see any supply of life-belts which were kept on the deck, but this was merely testimony as to what they did not see and amounts to little. On the other hand, Thompson, who testified at the trial, said that he knew there were two chests of life belts on deck; that these chests were on the after part of the boat deck, one on each side (Min. p. 672.) He knew about this because when the vessel was in New York he had painted the words "Life Belts" on the chests and had opened them and looked in. The chests were about 12 feet long, 5 feet high and 5 feet wide (Min. p. 673). He thought there were about forty or fifty life-belts in each (Min. p. 693).

Mr. J. F. V. Jones, Chief Steward, testified that in addition to the life-belts in the cabins there were what were called "Reserve Life-Belts" on the deck; that he saw them come aboard at the Liverpool landing stage; that afterward he saw the life-belts and quite a number of persons must have picked them up (Com. p. 275).

Mr. Lewis also testified that there were reserve life-belts on deck. (Min. pp. 621, 622, 663). Mr. Stockton, a passenger, said that he saw some one throwing life-belts out on deck and that he

put one on; that there were life-belts on deck and that the passengers were taking them (Com. p. 363).

It appears at many places in the testimony that stewards and stewardesses and members of the crew helped to supply passengers with belts and helped in putting them on. As, for example, when Rev. Mr. Clark, a passenger, testified—

“I saw a lady coming up as I was coming back and I saw a stewardess stop there very coolly and calmly to help her put on one of these jackets” (Wreck Inq., Qs. 11, 45).

Mrs. Bird, a stewardess, testified that she asked the ladies to keep calm and get their life-belts as quickly as they could and get on deck; that she remained on the deck where she had been until all the passengers had left and then she threw what remaining life-belts there were out on the deck. (Com. p. 298).

Mrs. Lasseter, a passenger, was shown a statement made by her son, who was also a passenger, and she said she agreed with it. On this subject her son had stated—

“I have nothing but the highest praise for the crew, especially the stewards. My mother, who was in the dining saloon at the time of the accident, would have been unable to get upstairs had it not been for the help she and other passengers received from the dining room stewards and cabin room stewardesses.”

Mrs. Lasseter also testified that it was a stewardess who helped her tie her life-belt (Wreck Inq. Q. 1964, 1965).

ACTUAL CLOSING OF PORTS.

As stated above, orders were given on Thursday to close the ports. Mr. Duncan, one of the engineers, testified that the orders were on Thursday for all the ports in his department to be closed. (Min. p. 544).

Mr. Lewis testified that every officer coming off watch had to go round the ship after he had finished his watch at night and see that all the port-holes were shut and darkened. (Com. p. 184).

Mr. Jones, First Officer, testified that after the explosion and before he went on deck he gave orders that if any ports were opened to try and close them immediately. He added—"I did not see any open, all that I saw were shut." (Wreck Inq. Q. 907, 908, 992, 993).

Mr. Freeman, a second passenger, stated that he went back to the second-class quarters (Wreck Inq. Q. 1194) and that he was the last man below in those quarters (Q. 1222) and that all of the port-holes were closed. (Q. 1197, 1198).

Morton, an A. B., testified that the port-holes abreast of boat No. 1 were all right. (Com. p. 179).

Mr. Griffith, Chief Third Class Steward, testified that F. deck was closed and not in use; that two of the sections were full of cargo and the other part was closed up and dark and not in use at all (Min. p. 290). He testified that all the port-holes were down.

The same witness on the Commission testified—"As far as I know from personal knowledge, up to twelve o'clock on the day of the accident there was not a port open in the third class." (Com. p. 291). The third class usually are on E and F deck, but F deck was not used this voyage.

Roper, a seaman testified that he had heard the orders for closing ports and that they couldn't get a breath of air in the forecastle. That up to ten minutes past twelve on that day to his knowledge the ports were closed and the dead lights down (Min. p. 434).

Mr. Duncan testified that the night before he had been around the firemen's and trimmers' rooms and noticed that the ports were all closed; that would be at midnight the night previous. (Min. p. 545).

Chief Steward Jones testified that Staff Capt. Anderson came up from below on the morning of the torpedoing and stated to him that he was perfectly satisfied that all ports and bulkhead doors were closed on F and E decks. He had just come up from below. (Com. p. 275).

There is conflicting testimony on the question of whether or not the ports in the dining saloons (which were on D deck) were opened or closed. Some of the passengers testified that they observed open ports there, but there is no agreement among them as to the number. Mr. Lauriat says all were open (Min. p. 90 and 102). Countess de Cippico said that some were open. Mr. Gauntlett said nearly all were open (Min. p. 114). Mr. Brooks said he saw them open on both sides of the dining room. (Min. p. 191). Mr. Lehman said half of them were open (Min. p. 270). Mr. Myers and Mr. Grab said all were open (Min. pp. 344, 374).

The above is all general testimony and it does not altogether agree.

On the other hand, Mr. Pierpont, a passenger who was in the dining saloon, testified that he saw the torpedo before it struck the vessel. His

attention was called to it by a passenger who shouted, "Look out." I looked through the port-hole, *through the glass of the port*, at least, and saw the torpedo coming into the ship. (Com. p. 320). He was asked—

"Tell me this if you can. Did you notice whether the port-holes on the day in question were closed or open?"

A. I did not see any open and the port-holes in the saloon were certainly shut, because I looked through the glass of one myself at the torpedo. I am certain about that" (Com. p. 323).

He also testified—

"The port-holes were all shut on the star-board side of the saloon" (Com. p. 323).

Mr. Bowring, another passenger, testified that he was sitting in the dining saloon and that when the explosion occurred the port-holes close to where he was sitting were driven in and the glass flew around him. (Min. p. 472). He said

"I think they (the ports) were mostly closed. They may have been open, one or two may have been open, but most of them I think were closed." (Min. p. 473).

Two or three of the passengers testified that port-holes in their staterooms were open. Some of these passengers, as, for example, Mr. Gauntlett had rooms *on B deck*. (Min. p. 129), which was about 45 feet above the water.

Taking up now this matter of ports, deck by deck, the testimony was that on F deck everything was closed. Capt. Anderson so stated to Mr.

Jones, the chief steward (Com. p. 275). It will appear (by Exhibit L. P. 2) that most of the forward part of this deck could, if required, be used for third class, but Mr. Griffith testified that it was not in use that voyage; was entirely closed up and dark with the port-holes fast (Min. p. 290). He also said: "*The majority on that deck were dummy ports, the same as on E deck. There were very few ports that you could possibly open on F deck*" (Min. p. 278).

As regards deck E. Capt. Anderson's examination also applied to this deck and he had said on the morning of the torpedoing that the ports were closed. There were one or two passengers who said that the ports in or near their rooms on this deck were open but there was other testimony as to this deck which goes to corroborate Capt. Anderson's report. For example, Roper, a seaman, complained that in the forecabin on this deck the air was bad because the ports were closed and the dead lights down. Mr. Freeman, a passenger, testified that he was the last man to go below to E deck before the vessel sank (Wreck Inq. Q. 1222). He testified:

"When I went to E deck it was in darkness owing to the electric light being out, apart from a little light that came in from the port-holes on the port side of the vessel. The star-board side was entirely in darkness. I did not realize at the time that the vessel was under water, but these port-holes normally are just above the water line.

"Q. Were they shut or open?

A. They must have been shut because there was no water to be seen running in anywhere.

Q. You saw no port-holes open?

A. None whatever" (Qs. 1196-1198).

An examination of Exhibit L. P. 2 will show that all of the forward part of E deck, except the forecastle itself, was used for third-class. Mr. Griffith, the chief third class steward, said:

“I know from personal knowledge up to twelve o’clock on the day of the accident there was not a port open in the third class” (Com. p. 291).

On the trial Mr. Griffith testified that just before the ship went down (and he went down with her) he made an inspection of this deck. He was asked:

“Did you see any water in any decks when you went down the last time just before you ran up?

A. Yes, sir, and that is why I ran up so rapidly. I gazed toward the starboard side and I saw one green mass of water that reached to the deck head and it was time for me to get.

“Q. On what deck was that?

A. That was on E deck.

Q. Had you seen any open ports on E deck?

A. No, sir, no ports were open.

Q. Could that water have come from any ports in your opinion—the mass of water that you saw?

A. No, it was an impossibility. The mass of water that I saw didn’t come from ports.

Q. Did it appear suddenly or was it a gradual accumulation?

A. Oh, no, there was nothing there at one moment and the next moment it was up to the deck head” (Min. p. 280).

An examination of Exhibit L. P. 2 will show that a small midship section of E deck extending

about 96 feet fore and aft was used as first class staterooms. The only testimony as to any open ports on this deck comes from first cabin passengers, and if there were any ports open, it can only have been in this section. An examination of this same diagram (L. P. 2) will show that these first class staterooms on E deck were immediately around No. 3 funnel and we have seen above that one of the torpedoes struck the ship about abreast of this funnel and that the force of the explosion was sufficient to blow the ports in in the dining saloon which was one deck higher up and directly over this section. So it is altogether probable that the starboard ports of this small first class section on E deck were blown in in any event.

As to D deck: the testimony about ports is conflicting as above stated. The only witness who testified to seeing any water enter ports on this deck was Mr. Adams. He said that he went down the companionway and where he stood at the companionway looking through the open door of the dining saloon he could see jets of water coming through the port-holes there (Adams' Deposition, pp. 9, 10). This was just at the point where Mr. Bowring has testified that the ports were blown in, for the examination of the diagram (Ex. L. P. 2) will show that a person standing at the foot of the main companionway stairs on D deck on the starboard side and looking through the saloon door would just about see the purser's table where Mr. Bowring was sitting.

Mr. Griffith testified that he had orders to keep all ports in his department closed; that on the night before the torpedoing he made the usual inspection at ten o'clock and saw that everything

was closed and that this covered E and D decks (Min. p. 289).

An examination of the rigging plan of the "Lusitania" (L. P. 3) will show that these ports on D deck were from 23 to 30 feet above water and if a few of them had been left open, that cannot have had much to do with the fate of the ship or of the time within which she sank.

BULKHEADS AND BULKHEAD DOORS.

No testimony was offered criticising the plan and construction of the "Lusitania."

There was a bulkhead door drill every day (Com. pp. 268, 272 and 289).

As previously noted, Capt. Turner had, earlier in the morning, ordered all the bulkhead doors closed and it was reported to him that they were closed. (Wreck Inq. Q. 152, 155). After the torpedo struck the ship, the watertight doors and the Stone Lloyd doors were closed from the bridge immediately by Second Officer Heppert, who had had strict orders from the captain to do that if he saw a torpedo coming. (Wreck Inq. Q. 1657, 1658).

Mr. Cockburn, Senior Second Engineer, testified that on approaching the war zone there was a general order to close as many bulkhead doors as possible, allowing sufficient to work the ship and that he knew this was done; that it was done during his watch from eight to twelve on Friday; that when the ship was struck he was on C deck above the engine room, and that he went below to F deck to see if the bulkhead doors were closed and he found that they had been closed. (Wreck Inq. Q. 756-768). He testified to the same effect on the commission. (Com. p. 260).

Mr. Griffith, Chief Third Class Steward, testified that all the bulkhead doors leading down into F deck were closed. On the commission he testified that there was a bulkhead door drill practically every morning, and that they did that on Thursday and Friday morning. They examined the bulkhead doors to see that the rubbers were in good order and that the levers were working. Mr. Griffith reports these bulkhead doors were in perfect order and condition and that they worked easily. (Com. pp. 289-290).

Mr. Little, Senior Third Engineer, testified that all the doors in the engine room were closed after the explosion. These doors which were so closed after the explosion were doors which, for the ordinary working of the ship, would have to be left open. He said that they had a daily bulkhead drill at all times and he said that the engine staff were "very highly competent" to deal with an emergency if it arose. (Com. pp. 268-269).

Mr. Jones, the First Officer, said that when he reached the boat deck he met the carpenter's yeoman who had just come up from below, and asked him if all the doors were shut down below and he answered that everything was shut below. "Those were the exact words we used to each other." Mr. Jones said that it would be the yeoman's business to know this because he assisted the carpenter in everything he did, and that is a part of the carpenter's duty, particularly with respect to hand-doors (Wreck Inq. Q. 1031-1033).

No evidence was offered by the claimants to contradict the above evidence as to the orders that were given and as to the closing of the doors.

The fact that water poured into the "Lusitania" so as to cause her to sink in so short a time does not justify the inference or suspicion that her bulk-

heads were not in proper condition or that doors were not properly shut. Mr. Davison's testimony as to the effect of torpedo explosions will show how widespread the effect of these two torpedo explosions must have been. But this is not only a matter of expert opinion, for, as above noted, several of the passengers testified to flying debris being blown far above the ship, so that one of them at least sought shelter under an overhanging deck so as not to be hit by this debris when it fell. Another testified that he and others were knocked down by falling water which had been carried up by the explosion. When one realizes the height of the boat deck of the "Lusitania" he must also realize the force of an explosion sufficient to blow this debris which was a part of the ship itself to such a height. Mr. Brooks said that it went "up in the air 150 feet above the Marconi wires." (Min. p. 196).

The fact is that the "Lusitania," being a passenger vessel, was built for conditions of civilization but was not built to withstand murderous attacks. A collision or a stranding might result in flooding two compartments, or it might flood only one, and the vessel was well constructed to meet injuries of this kind, for it would float with two compartments flooded. But it is obvious that the force of these explosions exposed the bulkheads to a much greater, and very different, strain from those which would have been caused by strains of stranding or collision. The giving way of these bulkheads therefore represents a typical case of the application of German military power to a structure designed for peace and supposed to be immune from such attack under the rules of civilization.

It is submitted that on the facts as proved, there was no negligence on the part of the petitioner.

If the Court shall so hold, it is not necessary to consider any question as to privity. If, on the other hand, the Court should hold that there was negligence, the following is submitted:

PRIVITY.

COMMUNICATIONS WITH THE "LUSITANIA."

The Chairman of the Cunard Company testified that after the "Lusitania" sailed from New York on her last voyage the owners could not communicate with her and were not allowed to send a wireless message to her. (Wreck Inq. Q. 261, 264). As above noted, the Admiralty did send wireless messages which were intended for the "Lusitania" and which did reach her.

The instructions given by the Admiralty were "confidential instructions for the Masters." The petitioner did not at the time know their contents (Com. p. 116, 118).

SPEED.

On this voyage and on a number of previous voyages, as above stated, one-fourth of the boilers were not in use, and this was done by direction of the petitioner, for reasons already discussed. But as has also been shown, this still left the "Lusitania" the fastest passenger vessel crossing the Atlantic, and, as also shown, it would have made practically no difference in the ability of the German submarine to sink her if she had then had a speed of 24 knots instead of 21.

More than this, the owners had on this voyage caused to be put on board the "Lusitania" at New York the full supply of coal which would have been required for crossing the ocean with all the boilers

in use (Com. p. 129; Min. p. 28, 29) and in an emergency it was possible for her to get up steam in all of her 24 boilers with the crew she had. (Com. p. 129).

PERSONAL CONTRACTS.

Certain of the claimants allege that the "contracts entered into between the petitioner and the passengers, for the loss of whose lives the answering claimants have filed their claims, were personal contracts between said passengers and the petitioner and that the petitioner is not entitled to limit its liability for losses caused to the said claimants by reason of the failure of its duty to exercise the highest degree of care in carrying said passengers and their effects to Liverpool on the said voyage, which the petitioner owed to the said passengers as a common carrier and under the said contracts." (Adams answer p. 11).

The decisions of the Federal courts on this subject of personal contracts as affecting the right to limit liability leave the law in a somewhat unsettled state in certain particulars, but those uncertainties do not affect the issues in this proceeding. It is plain that one may contract away his rights under most statutes, including these statutes permitting limitation of liability. But these statutes limiting liability have been considered necessary if water-borne commerce was to go on as conducted in modern times, and the protection of these statutes ought not to be denied unless it is very clear that the shipowner himself has contracted away his rights.

There are several distinct objections to sustaining here this contention of the claimants.

1st. If the protection of the statute is denied to the shipowner because he has made a personal

contract it must appear that he has himself *created* the obligation and that it is not one which has been *imputed* to him by law. Or, as was stated in *Benner v. Pendleton*, 217 Fed. Rep. 479, 507—

“The rule which has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or *imputed to him by law*.” (Italics ours).

This brings up the distinction between claims on contract and claims sounding in tort, and the claimants seem to have overlooked the distinction between liabilities *created* by contract and liabilities *imposed* by law. A right to recover in the first case is a right of action on contract, while in the second the claims here must sound in tort.

In *Atlantic & Pacific R. R. v. Laird*, 164 U. S. 393, an action for personal injuries to a passenger holding a first or (second class) ticket, the court discussing this question said:

“The doctrine is very clearly expressed in *Kelly v. Metropolitan Railway Company*, (1895) 1 Q. B. 944, where the Court of Appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company, while he was travelling on their line, is an action founded upon tort. In reading the judgment of the Court, A. L. Smith, L. J. said (p. 947):

‘The distinction is this—if the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is

complained of exists) then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.'

So, in the case at bar, there was a duty shown, independently of contract; and the trial court, looking at the allegations of a complaint which had not been demurred to, solely for the purpose of determining the propriety of an amendment, was manifestly justified in holding that the right to recover was not founded upon a breach of the contract, but upon the neglect of a common law duty. The action therefore was *ex delicto*."

Under the common law and in admiralty no damages can be recovered for the death of a human being on the high seas or on waters navigable from the seas caused by negligence in the absence of an act of Congress or a statute of a state giving a right of action therefor (The Harrisburg, 119 U. S. 199). No such right was created by the passenger tickets as an examination of them will show.

Considering for the sake of the argument that the claimants' allegations are correct there can be only two foundations for the claims of the claimants: First, the common law duty *imposed* on the petitioner to use a high degree of care, and second, the statute giving a right of action in case of death. These two obligations were not *assumed* by the petitioner by its own contract, but were *imposed* on it by others. The only reason why courts have refused limitation of

liability has been because the petitioner seeking limitation had itself created the liability by contract. That is not this case.

An action on a passage ticket claiming damages for death could not be maintained for no such action was known at common law. The claim of the claimants if they have any must consequently be founded on the statute which gives the right to recover damages for death caused by wrongful act. The basis of such a right of action is a tort committed and the claimants have recognized this for in their answers they expressly allege negligence.

The proposition here contended for by the petitioner may be tested by the fact that in every case in the Federal courts where a contract has been held to be a personal contract in such a sense as to prevent the shipowner from limiting liability the contract has been one on which the other party to the contract could sue. In this case action could not be brought by these claimants on the passage contracts for these death claims. The only basis of those claims is the British statute.

Second.—A contract to be “personal” within the meaning of the cases on this subject must be actually signed by the shipowner personally and not by somebody else on his behalf.

Thus, in *Pendleton v. Benner Line*, 246 U. S. 353, (below 217 Fed. 497), where Fields Pendleton, who was a part owner of the boat, himself signed the charter party with the name of Pendleton Brothers, only Fields Pendleton was held responsible as a personal contractor. The other part owners enjoyed a limitation of their liability, though Fields Pendleton had authority to bind them to the contract.

So in *The Julia Luckenbach*, 235 Fed. 388, 393, Edgar F. Luckenbach, one of the part owners, signed a charter party as trustee of an estate. In fact he signed the charter party in behalf of a number of co-owners, but his was the only individual signature on it. Hough, *J.*, allowed limitation as to all the owners, p. 396, but the Court of Appeals denied the limitation as to the estate of Luckenbach, for which Edgar F. Luckenbach personally signed the charter as trustee. The limitation therefore stood as to the other part owners, though Edgar F. Luckenbach had their authority to sign the charter party.

That there might be no uncertainty in reference to this point the parties here have stipulated "that each of said tickets was signed and delivered by an agent of the petitioner authorized to do so, who was not an officer, director, manager or general agent of the petitioner." (Min., p. 955).

That is, these passage tickets were signed by passenger ticket agents or clerks of agents in the various local offices where tickets of the Cunard Company were sold. Such contracts are not the personal contracts of the petitioner within the meaning of the rule which refuses limitation of liability in respect of personal contracts.

Third.—The whole purpose and intent of the statutes limiting the liability of shipowners are against extending the doctrine of personal contracts to passenger tickets.

If passenger tickets are held to be such personal contracts, there is no apparent reason why the same should not be held in respect to such bills of lading as are issued by the regular steam lines and are regularly signed on behalf of the lines

at some agency. There is no sound reason in the nature of things why a passenger ticket signed by a clerk in a ticket office in New York or Chicago should be held to be a personal contract of the shipowner, while a bill of lading signed by a clerk on the pier, or perhaps in the same office, is not a personal contract. If this is the law it would leave the regular steam lines with little protection under the statute limiting liability and would cause great surprise to all interested, perhaps no where more so than in the Federal courts where the practice has been to permit limitation of liability as against death claims. As the Court said in *Butler v. Boston S.S. Co.*, 130 U. S. 527, 552— "We think the law of limited liability applies to cases of personal injury and death as well as to cases of loss of or injury to property."

In "*La Bourgogne*" 210 U. S. 95 limitation of liability was allowed and there were in that case both signed bills of lading and signed passenger tickets.

The petition should be granted and the claims should be dismissed with costs.

LORD, DAY & LORD,
Proctors for Petitioner.

LUCIUS H. BEERS,
J. PARKER KIRLIN,
ALLAN B. A. BRADLEY,
Advocates.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

Re LUSITANIA,

PROCEEDING TO LIMIT LIABILITY.

**Memorandum for Petitioner as to Application
of International Law.**

LUCIUS H. BEERS,
Counsel for Cunard S.S. Co.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of the

Petition of THE CUNARD STEAMSHIP COMPANY, Limited, as owner of the steamship "Lusitania," for limitation of its liability.

Before
HON. JULIUS
M. MAYER,
District
Judge.

BRIEF FOR PETITIONER AS TO APPLICATION OF INTERNATIONAL LAW.

Preliminary statement.

In the main brief filed in this proceeding for the petitioner the facts are stated. It is confidently urged that if nothing but the questions of fact were here involved the Court should hold that there was no negligence either on the part of the Cunard Company, as owner of the "Lusitania," or on the part of the officers and crew.

But there is here involved a question of law as to the status and rights of non-combatants so important that compared with it the considerable amount at stake in this proceeding is relatively a trifle. That question is discussed in this brief. It is a question which cannot be avoided for the rules as to proximate cause must necessarily be considered here and in order to determine

which rule applies it is necessary to decide whether or not the act of the commander of the German submarine was legal or illegal under international law.

It is not disputed that the "Lusitania" was sunk by a torpedo or torpedoes fired without warning by a German naval vessel, but the claimants contend that the Cunard Company was guilty of certain acts of negligence which so far contributed to the loss of life and to the damage as to make the Company legally responsible. The claimants do not contend that these alleged acts of negligence increased those ordinary dangers of the sea which are known and constant factors in all ocean travel. But they contend that they exposed the vessel to the attack in such a sense that these alleged acts of the Company were legally the proximate cause of the loss.

If the act of the German commander in sinking the "Lusitania" without warning was a lawful act, then under the law of proximate cause (which is discussed in another brief filed in this proceeding for the petitioner) the Court must here consider whether the act of the commander was a probable result of the alleged negligence of the petitioner. But if that act of the naval commander was an unlawful act, then it is not necessary for the Court to consider what its connection was with any alleged negligence on the part of petitioner. For, under the law as to proximate cause, the negligence of the petitioner cannot be the proximate cause of the loss if an independent *illegal* act of a third party intervene to cause the loss.

This rule of the law of proximate cause there-

fore directly raises here the question whether the act of the German naval commander was lawful or unlawful.

Before taking up the question of international law whether the act was lawful or unlawful, there is the preliminary inquiry whether the petitioner was entitled to shape its conduct on the assumption that others would act in a legal manner, and the decisions which follow show the attitude which the Federal courts take on that preliminary question.

Jarnagin v. Travelers' Protective Assn.
(1904) (133 Fed. Rep. 892, Circuit
Court of Appeals, Sixth Circuit).

In that case it was claimed that Jarnagin had been placed under arrest by certain deputy sheriffs and disarmed, whereby it became their duty to afford adequate protection against violence, and that while so under arrest and disarmed, the officers negligently permitted certain persons to assault and kill him. The action was brought on a policy on Jarnagin's life, which provided that there could be no recovery in case of intentional injury inflicted by the insured or by any other person, but it was claimed that the proximate cause of Jarnagin's death was the negligence or fault of the officers.

The court decided against this contention and in sifting the claim of negligence stated as follows the rule that one is entitled to assume that others will obey the law (p. 896)—

“It must be presumed that in this country the law, as ordinarily enforced, is adequate to protect life. It cannot be assumed that it is

necessary for a man to place or keep himself in custody and under the protection of officers in order to secure his personal safety. Nor can it be assumed that a citizen must carry weapons in order to safeguard his person. From the fact, therefore, that a man is unarmed, and not protected by officers, it cannot reasonably and naturally be anticipated that he will become the victim of murder. If he is murdered while unarmed and unprotected, the act of his murderers, and not the failure of the law to protect him, must be regarded as the proximate cause of his death."

Cole v. German Savings & Loan Society
(1903) (124 Fed. Rep. 113 U. S. Circuit Court of Appeals, Eighth Circuit.)

In that case as the plaintiff was entering an elevator in the defendant's building, a boy who was a stranger to her and was not employed by the defendant (but who had been seen by one of the witnesses endeavoring to operate the elevator once and riding upon it and visiting the boy in charge of it a dozen times) hurried past the plaintiff, seized the sliding door of the elevator shaft, pushed it back as far as it would go and stepped back. The place was dark because the lights there were not lighted and the elevator was at an upper floor. The plaintiff, supposing the strange boy was the operator, stepped into the shaft, fell and was seriously injured.

The court decided against the plaintiff holding that the proximate cause of her injuries were the illegal acts of the boy and not any contributory negligence of the defendant. Judge Sanborn,

writing for the court, reviewed at length the authorities on this subject and said on this point (p. 119)—

“The legal presumption was that this boy and all boys and men would obey the law, would refrain from committing trespasses upon the defendant’s rights or property, and would discharge their moral and social duties. *The defendant had the right to indulge in this presumption, and to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other; for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellows will either violate the laws or disregard their duties.*” (Italics ours).

The Young America (1887) 31 Fed. Rep. 749.

Here a canal boat in tow broke away from the tug by reason of encountering ice fields and was beached. The tug stood by and endeavored to render assistance but her pumps froze and she went to New York for help. A wreck master took possession of the canal boat, took the coal out of her, cut her to pieces and sold her for old wood, whereupon the owners of the canal boat sued the tug for damages. The District Court held that it was the duty of the tug to prevent the canal boat from falling into the hands of third persons and because this was not done and because the libellant’s loss was greatly increased by the act of the wreck master the District Court held damages should be divided.

On appeal to the Circuit Court the above decision was reversed. Judge Wallace, writing for the Court, said (p. 753)—

“The unlawful acts of third persons, though directly induced by the original wrong of the defendant, are never to be attributed to the original wrong as a proximate cause of damage for which recovery can be had.”

The Cunard Company here contends that under the rule which is recognized in the above cases it was entitled to assume that German naval vessels would observe international law, and that even if it had been guilty of negligence it cannot be held liable here if a violation of law by others intervene to cause the injury complained of.

What then is the rule of international law on which the Cunard Company has the right to rely?

The rule is stated as follows in the official communication addressed by the Secretary of State of the United States to the German government, under date of June 9, 1915. Mr. Lansing first states the facts briefly thus:

“Whatever be the other facts regarding the ‘Lusitania,’ the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare.”

The rule is then stated as follows:

“Only her actual resistance to capture or

refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, as do the naval codes of all other nations, *and upon it every traveler and seaman had a right to depend.* It is upon this principle of humanity as well as upon the law founded upon this principle that the United States must stand.” (Italics ours).

White Book of Department of State entitled “Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties European War No. 2. Printed and distributed October 21, 1915.” (p. 172).

The Court will, no doubt, give full and appropriate weight to the attitude taken by the Department of State on this particular subject, but to enable the Court to form and express a direct opinion on this question, there are submitted below some of the legal and historical sanctions for the rule that an unarmed merchant vessel belonging to a belligerent is immune from attack by an enemy vessel without previous warning and without provision being made for the safety of her passengers and crew.

We are here considering a situation in May, 1915, and in order to decide this question it is necessary to call before the mind the international conditions then existing. In time of war opinion

develops and changes rapidly. If then we in the United States should judge these events in the light of to-day we should have the wisdom which is given us in respect to matters which lie in retrospect but that would not represent the real problem which was presented more than three years ago to those who were then charged with the responsibility of action. At the time when this brief is filed (July, 1918) we are at war with Germany and we are at war because Germany has declined to be bound by the recognized rules of International law. But in the spring of 1915 we did not understand that Germany declined to recognize International law, and when the "Lusitania" was sunk the surprise was as great as the horror.

A series of communications then passed between the United States Government and the German government, finally resulting in April 1916 (after the sinking of the "Sussex") not only in the formal recognition by the German government of the rule of international law here contended for but in the statement by that government that that rule was "in accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law." See Official Communication by German Foreign Office to Ambassador Gerard May 4, 1916; (White Book No. 3 of Department of State, pp. 302, 305).

It follows from this that this rule of international law was generally recognized in the spring of the year 1915, even by the German government, and it is a matter of current history, of which the court will no doubt take notice, that

this recognition of international law continued until February 1, 1917, when the German government announced its change of policy with respect to submarines and thus brought the United States into the war. In view of more recent history bearing on this doctrine, it is therefore necessary in considering this question to detach the mind from conditions now existing and to consider the subject from the standpoint of conditions as they existed in May, 1915.

A strong light is thrown on this question by a line of testimony given at this trial by a number of passengers, many of whom are claimants in this proceeding. These passengers—and most of them were experienced ocean travelers—testified that they read on the morning of May 1st before the vessel sailed, the warning note issued by the German Embassy. All must also have known of the German War Zone proclamation of February 1915 for, as a matter of current history, that was a subject which was receiving much attention at that time. *Nevertheless these passengers sailed.* Whatever they may now say after the tragedy, and after the many tragedies by which we have learned that Germany does not obey international law, the fact remains that *at that time* they did not believe that German Naval Commanders would do such a thing. That was the attitude of the civilized world at that time. It was not based on an obscure point of law, but on widely understood principles. The trust in this view was a reality, in fact so much of a reality that those passengers were willing to risk their lives on it.

FIRST POINT.

The United States courts recognize the binding force of International Law.

General statements to this effect were made in *The Scotia* (14 Wall. 170, 187) and *The New York* (175 U. S. 187, 197). It has been recognized by the officials of the American Government that "The law of nations makes an integral part of the laws of the land."

See *Letter of Thomas Jefferson*, Secretary of State, to French Minister June 5, 1793, American State Papers Foreign Relations, I, 150.

(For this and other authorities on this subject see Moore's International Law Digest, I, p. 10).

In the case of *Kansas v. Colorado* (185 U. S. 125, 146), Mr. Chief Justice Fuller said:

"Sitting as it were, as an international as well as a domestic tribunal, we apply Federal law, State law, and International law, as the exigencies of the particular case may demand."

When the case last mentioned came before the Court a second time (206 U. S. 46) Mr. Justice Brewer said (p. 97)—

"Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon the principles of International

law. International law is no alien in this tribunal.”

Mr. Justice Gray in discussing the sanctions of International law in the case of *The Paquete Habana*, (175 U. S. 677) said (p. 700):

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”

SECOND POINT.

To ascertain International Law resort must be had to the customs and usages of civilized nations and to the works of jurists and commentators.

In the case of *The Paquete Habana* (175 U. S. 677, 700, 701) above referred to, Mr. Justice Gray states the rule on this subject, as follows:

“For this purpose [that is, for the purpose of ascertaining international law] where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors

concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215."

"Wheaton places, among the principal sources of International law 'Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.' As to these he forcibly observes; 'Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.' *Wheaton's International Law*, (8th ed.) Sec. 15."

"Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on International law.' *1 Kent Com.* 18."

THIRD POINT.

The works of jurists and commentators uphold the principle here contended for by the petitioner.

Phillimore on International Law 3rd Ed. Vol. 3 p. 584 quoting Lord Stowell says:

“A great part of the Law of Nations stands on no other foundation; it is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say that mere general speculation could bear you out in a further progress, thus, for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a Belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.”

There can be no doubt as to the principle that belligerent powers have the right to make prize of the ships, goods and effects of each other on the high seas.

Sir Sherston Baker in his work “First Steps in International Law” (p. 236) declares the rule as follows:

“It may therefore be stated as the existing and established law of nations, that, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all subjects of the belligerent powers, and of their allies.”

G. B. Davis in his *Elements of International Law* says, page 358:

“Of the right to capture private property at sea, which has been recognized from the earliest times, there can be no serious doubt; no principle, indeed, is better established at International law.”

and at page 359 says:

“At the Peace Conferences of 1899 and 1907 at the Hague a proposition was submitted on behalf of the United States giving an immunity from capture at sea of all non-contraband private property. At this conference of 1899 it failed to receive favorable consideration; at the conference of 1907 although supported by a majority of the states represented it failed to secure sufficient support to warrant its adoption as a rule of conventional maritime law.”

In addition to this liability to capture there is the further liability that if taken prize by the enemy the ship is liable to destruction under certain conditions.

“Certain of these conditions were formulated by the Institute of International Law at Turin in 1882 as follows:

(1) If the captured ship is unseaworthy; (2) if she is unable to accompany the fleet; (3) if there is danger of recapture on the approach of a superior force of the enemy; (4) if the captor cannot without danger to himself spare a prize crew; (5) if the port of the captor is too remote for the vessel to be taken in. These regulations are, in the main, similar to those adopted by Great Britain, the United States, Russia and Japan." A. Pearce Higgins *War and the Private Citizen*, (p. 78).

Speaking of the right to destroy enemy merchantmen, Chief Justice Cockburn in his judgment in the Geneva Arbitration says of this system that

"However revolting such a system of warfare, it is still within the stern principle of International law, relative to war, which justifies both the seizure and the destruction of enemy's ship and goods at sea, on the principle that whatever tends to impoverish the enemy is allowable. The practice had been sanctioned by the conduct of the United States themselves in their last war with Great Britain."

Quoted in Creasy on International Law, p. 562.

But this liability to capture and possible destruction is subject to a vital limitation which no excuse of convenience or necessity will justify the attacking vessel in ignoring, viz.:

That no enemy vessel can be destroyed until after the captor has transferred to a place of safety *all persons* on board the enemy ship.

In a recent work by L. A. Atherley-Jones entitled *Commerce in War* it is said (p. 529):

"If an enemy ship and cargo are destroyed

under some necessity care must be exercised in taking out all the *persons* on board together with their baggage." (Italics ours).

and the author cites Professor Holland as saying (p. 535)

"An enemy's ship after her *crew* has been placed in safety may be destroyed." (Italics ours).

The article of Professor Holland in which the statement occurs will be found quoted on page 82 Naval War College 1907.

Oppenheim, in his work on International Law 2 Ed. (Vol. 2, p. 244) after discussing when enemy merchant ships may be sunk, says:

"Be that as it may in every case of destruction of the vessel the captor must remove *crew*, ship papers and if possible the cargo before the destruction of the prize and must afterwards send crew, papers and cargo to a port of a Prize Court, for the purpose of satisfying the latter that both the capture and the destruction were lawful." (Italics ours).

Taylor, also in his book on International Law, says (p. 572):

"If bringing in is difficult from unseaworthiness, disease, lack of men or other cause the captor may appraise and sell the prize if he can find a purchaser; he may destroy it *saving of course the persons* on board." (Italics ours).

Westlake, in his treatise on International Law, 2nd Ed. states the rule thus (p. 309, Part II):

"And in any case of the destruction of a

ship enemy or neutral it would be the destroyer's duty to save the men and to preserve all the papers and other evidence which might assist a neutral claimant in proving that innocent property of his had been destroyed." (Italics ours).

In a recent work by A. Pearce Higgins on War and the private citizen, already referred to, the question is discussed on page 33, the author saying:

"Belligerents have a right by the customary rules of International law to sink the merchant vessels of their enemy whenever military necessities demand, including cases where the captor cannot spare a prize crew without endangering his own ship's safety. In all cases the *passengers and crew must be first removed*; but it may often happen that there is no spare ship on which they can at once be placed, and then they will find themselves on the enemy's cruiser which, even if it be one of the largest type is but ill equipped for their reception. Until the captor can get rid of them, either by transfer to a passing neutral merchant ship or by landing them at a neutral port, they remain exposed to the dangers of a naval engagement. This is a risk to which both enemy and neutral subjects on an enemy passenger vessel are exposed, and they are liable to it even though when they started on their voyage the whole world was at peace." (Italics ours).

This author further says, page 78:

"In all cases where enemy ships are destroyed *all persons on board* and all documents essential in elucidating the matter in

the prize court are previously to be taken from the ship (Russian Regulation 1901 Art. 40. Japanese Regulation 1894 Art. 22 1904 Art. 91).'' (Italics ours).

The Manual of Naval Prize Law edited by Professor Holland refers to the rule that, where an enemy's ship is destroyed, the commander should remove her crew and papers and forward them to a proper port of adjudication in charge of a prize officer. (Art. 304). (See U. S. Naval War College Vol. 1907).

''The legality of the destruction of enemy ships has further been recognized by Convention No. 6 of the Hague Conference of 1907 as Article 3 lays down that enemy merchant ships which left their last port of departure before the commencement of the war, and which are met at sea while ignorant of the existence of hostilities may be destroyed with indemnity, or *on conditions that the safety of persons as well as paper on board is provided for (sous l'obligation de pourvoir a la securite des personnes)*.'' (Italics ours).

The Institute of International Law adopted in 1887 a rule on the subject which while not binding on belligerents indicates the prevailing practice as understood by the members of the Institute. The rule is as follows:

''Art. L. The Captor shall be allowed to burn or sink the enemy ship captured after having transferred on board the capturing ship *all persons* on board the enemy ship, as well as the cargo, in so far as this is possible and after the commander of the capturing ship shall have taken into his custody all

papers relating to the captured ship and all things which might be of importance for the judicial inquiry and for any claims for damages on the part of the owners of the cargo in the following cases:" (Italics ours.) and then gives five conditions under which the ship may be destroyed.

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This specific rule as to caring for the safety of persons before the enemy merchant ship is destroyed is entirely in accord with the general principles of international law in reference to the obligations of belligerents toward non-combatants. For statements of the rule on this subject the following are referred to:

T. J. Lawrence, in his *Principles of International Law*, lays down the rule (page 344) that

"Non-combatants are exempt from personal injury except in so far as it may occur incidentally in the course of the lawful operations of warfare."

In Vattels *Law of Nations*, Chitty's Edition, it is said (p. 362) as to the disposition to be observed toward an enemy:

"Let us never forget that our enemies are men. Though reduced to the disagreeable necessity of prosecuting our right by force of arms, let us not divest ourselves of that charity which connects us with all mankind. Thus shall we courageously defend our country's rights without violating those of human nature. Let our valour preserve itself from every stain of cruelty and the lustre of victory

will not be tarnished by inhuman and brutal actions."

In Halleck on International Law, the general principles in dealing with non-combatants are stated Vol. II, page 15, as follows:

"Each party may employ force, not only to resist the violence of the other, but also to secure the objects for which the war is undertaken. The first and most important of these rights, which the state of war has conferred upon the belligerents is that of taking human life. This right in its full extent, authorizes the individuals of the one party to kill and destroy those of the other, whenever milder means are insufficient to conquer them or bring them to terms."

"But this extreme right of war, with respect to the enemy's person, has been modified and limited by the usages and practice of modern warfare."

"But we may not take the lives of those who are not in arms, or who, being in arms, cease their resistance and surrender themselves into our power."

(Vol. II, p. 16).

"There are certain persons in every state who as already stated are exempt from the direct operation of war. Feeble old men, women and children, and sick persons, come under the general description of enemies, and we have certain rights over them as members of the community with which we are at war; but as they are enemies who make no resistance, we have no right to maltreat their persons, or to use any violence toward them,

much less to take their lives. This says Vattel is so plain a maxim of justice and humanity, that, every nation in the least degree civilized acquiesces in it."

Oppenheim on International Law (2 Vol. 2nd Ed. p. 311) says that among the violations of the rules of War are

"(6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property and especially pillaging."

"(12) Attack on or sinking of enemy vessels which have hauled down their flags as a sign of surrender. *Attack on enemy merchantmen without previous request to submit to visit.*" (Italics ours).

FOURTH POINT.

The regulations which civilized governments have issued governing their naval vessels uphold the principle here contended for by the petitioner.

In the Russian Prize Regulations March 27, 1895, (cited in Moore, Vol. VII, p. 518) it is provided:

"Article 21. In extraordinary cases, when the preservation of a detained vessel proves impossible in consequence of its bad condition or extremely small value (*sic*), the danger of its recapture by the enemy, or the considerable distance or blockade of the ports, as well

as of danger threatening the detaining vessel or the success of its operations, the naval commander is permitted, on his personal responsibility, to burn or sink the detained vessel *after having first taken all the people off it*, and, as far as possible, the cargo on board, and also after having taken measures for preserving the documents and other objects found on board, and which might prove essential in elucidating matters when the case is examined according to the method prescribed for prize cases.” (Italics ours).

By the Japanese Prize Law of 1894, Article 22, (cited Moore, Vol. VII, p. 525; from Takahashi's Cases on International Law during the Chino-Japanese War) it is provided:

“If the enemy's vessels are unfit to be sent to a port as stated in Article 18 the commander should break up the vessels *after taking the crew*, the ship's papers and the cargo if possible into his ship. *The crew*, the ship's papers and the cargo should be sent to a port as stated in Article 18.” (Italics ours).

In the Japanese regulations of March 7, 1904, it is provided in

“Article XCI. In the following cases and when it is unavoidable the captain of the man-of-war may destroy a captured vessel, or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her he shall transship *all persons on board* and, as far as possible, the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination.” (Italics ours). [Takahashi p. 788].

England has recognized for centuries the existence of such rule:

“In the year 1512 Henry the Eighth issued instructions to the Admiral of the Fleet which sailed in the expedition to Guienne as follows:—

‘If any shippe or shippes of the flete mete any other shippes or vessels on the see or in porte or portes, making rebellion, resistance or defence against theym, then it is lawfull for them to assemble and take theym with strong hand to bring them holy and entirely to the said admirall without despoylling or embeselying of the goods, or doing harme to the parties ther to abyde the ordinance of the lawe as the said admirall shall awarde’ ”
(Cited in Hosack’s Law of Nations p. 168).

By 22 Geo. 2nd, c. 33, Stat. 2 Sec. 9, (1749) it is provided:

“If any ship or vessel be taken as prize none of the officers mariners or other persons on board her shall be stripped of their cloaths or in any sort pillaged, beaten, or evil intreated, on pain of the offenders being liable to such punishment as a court martial shall think proper to inflict.”

In the British Admiralty Manual of Prize Law of 1888 Sections 303 and 304 deal with the destruction of captured vessels.

Sec. 303 provides that if the vessel is not in condition to send to port or if the commander is unable to spare a prize crew the vessel should be released “unless there is clear proof that she belongs to the Enemy.” Sec. 304 then provides:

“But if in either of these cases there be

clear proof that the vessel belongs to the Enemy the commander should *remove her crew* and papers and if possible her cargo and then destroy the vessel." (Italics ours.)

In the year 1905 a Royal Commission on the Supply of Food and Raw Material in Time of War was appointed in Great Britain. The Report of the Commission contains questions by Sir John Colcomb with replies by Professor Holland on the subject of destruction of prizes.

"6835. Then, as regards the destruction of prizes, what about the crews on board those ships? They must take out the crews, and they may take out the cargoes if they have time to do so.

6836. It is against international law, then, to sink them without taking out the crews?—Yes.

6837. Therefore, that is another limitation to the power of a man-of-war making seizures and destroying vessels, because it crowds the ship?—Yes, and it takes time to transfer, too.

6838. Therefore, there are two limitations put by international law: one is the necessity of furnishing a prize crew to bring the prize into court and the other is that if they resolve to destroy her they must crowd their ship with her crew?—Yes. There is no necessity where she is clearly enemy property to spare her; that is only the case where neutral property is involved.

6839. But there is an equal obligation to save the crew, is there not?—Certainly, always" (Cited in U. S. Naval War College 1907, page 104).

So far as concerns the regulations of the United States Government, our lawmakers seem never to have considered it necessary to instruct our naval commanders not to sink enemy merchantmen without preserving the lives of the non-combatants on board. Article XVII of the United States Instructions to Blockading Vessels and Cruisers, issued June 20, 1898, (cited in the Manila Prize Cases, 188 U. S. 254, 259) is practically the same provisions as the British Statute above cited (22 George 2nd, ch. 33). There can be no doubt that the principle here contended for by the petitioner is understood by the local officers of the United States Government as being the rule applicable to this subject. This will appear from a memorandum prepared by the Department of State, by direction of the President, on March 25, 1916, as follows:

(8) "The exercise of the right of capture is limited, nevertheless, by certain accepted rules of conduct based on the principles of humanity and regard for innocent property, even if there is definite knowledge that some of the property, cargo as well as the vessel, is of enemy character. As a consequence of these limitations, it has become the established practice for warships to give merchant vessels an *opportunity to surrender or submit to visit and search before attempting to seize them* by force. The observance of this rule of naval warfare tends to prevent the loss of life of non combatants and the destruction of innocent neutral property which would result from sudden attack."

(9) "If, however, before a summons to surrender is given, a merchantman of belligerent

nationality aware of the approach of an enemy warship, uses its armament to keep the enemy at a distance, or after it has been summoned to surrender it resists or flees, the warship may properly exercise force to compel surrender."

(10) "If the merchantman finally surrenders, the belligerent warship may release it or take it into custody. In the case of an enemy merchantman it may be sunk, but only if it is impossible to take it into port, and *provided always that the persons on board are put in a place of safety*. In the case of a neutral merchantman, the right to sink it in any circumstances is doubtful." (Italics ours.) (See U. S. White Book, European War, No. 3, p. 192.)

FIFTH POINT.

The commanders of American vessels have uniformly followed the rule here contended for by the petitioner.

The war with Spain left but little record as to the capture of enemy merchant vessels by American vessels of war. This was also true of the Civil War and the Mexican War, because in both of those wars the enemy had but few commercial vessels to be captured.

During the War of 1812, however, American naval vessels and privateers were active in capturing and destroying British ships, and although military rules were a century ago harsher than they are, or ought to be, at the present time, the

conduct of American commanders at that time will throw light on this question.

A.

War of 1812.

The number of British merchant vessels captured by the United States Navy during the War of 1812 was very large. James, in his "Naval Occurrences" speaking from the British point of view places the number of vessels somewhere below the thousand mark. American estimates are about 1,600. (See "History of the War Between the United States and Great Britain," by J. Russell—B. & J. Russell 1815). Of the vessels so captured a large number, possibly a third, were sunk or otherwise destroyed. This practice was in conformity with the naval necessity of the situation and the instructions and policy of the Secretary of the Navy as will appear from quotations from his letters quoted *infra*.

Before passing to an examination of the official comments on this phase of the war, one interesting fact may be noted. In all the flood of pamphlets, satires, libels and critical works called forth by the War of 1812 there is, so far as counsel can find, no accusation that either side failed to safeguard the lives of non-combatants who sailed on merchant vessels. James, in his "Naval Occurrences," bitterly and oftentimes unfairly criticises every phase of the naval war as carried on by the United States, yet nowhere does he bring forward any such charge. On the other side, the published report of the Committee of the House of Representatives "to whom was referred that part of the President's message which relates

to the spirit and manner in which the war had been waged by the enemy," similarly fails to make any such charge. (Report of the Committee of the House of Representatives May 1813).

The first point to be emphasized is that in the attack on British Commerce in the War of 1812, the aim was for the most part to destroy the vessels captured. Although the Secretary of the Navy issued no general order on this score, nevertheless the repetition of specific instructions often in the same language fairly indicates a decided policy. The following quotations are from American State Papers (1834) Naval Affairs, Volume I, pp. 373 to 376.

Extract from letter from William Jones, Secretary of the Navy, to Lieut. William H. Allen, commanding U. S. brig "Argus," lying at New York, dated June 5th, 1813:

"You will then proceed upon a cruise against the commerce and light cruisers of the enemy, *which you will capture and destroy in all cases*; unless their value and qualities make it morally certain that they may reach a safe and not distant port.

* * * * *

It is exceedingly desirable that the enemy should be made to feel effects of our hostility and of his barbarous system of warfare; and in no way can we so effectually accomplish that object, *as by annoying and destroying his commerce, fisheries and coasting trade.*" (Italics ours.)

Extract from letter from the Secretary of the Navy to Capt. Charles Stewart commanding U. S. Frigate "Constitution" dated September 19th, 1813:

“The commerce of the enemy is the most vulnerable point we can attack and its destruction the main object; and to this end all your efforts should be directed. Therefore, unless your prizes shall be very valuable and near a friendly port, it would be imprudent and worse than useless to send them in. In every point of view, then, *it will be proper to destroy what you capture*; except valuable and compact articles, that may be transshipped.” (Italics ours.)

Extract from letter from Secretary of Navy to Master Commandant George Parker, commanding U. S. brig “Siren,” dated December 8th, 1813:

“*I, therefore strenuously urge and order the destruction of every captured vessel and cargo*, unless so near to a friendly port, as to leave little doubt of safe arrival or that the merchandise shall be so valuable and compact as to admit the trans-shipment, without injury to the vessel under your command, or to the public service.” (Italics ours.)

Extract from letter from Secretary of Navy to Master Commandant Lewis Warrington of the U. S. sloop of War “Peacock,” dated February 26th, 1814:

“You will therefore, sir, unless in some extraordinary cause that shall clearly warrant an exception, destroy all you capture.”

Quotations to the same effect might be extended but enough has been set forth to indicate the policy adopted by the United States. In such a wholesale attack upon a merchant marine, the question of the safety of the crew, passengers, etc., must repeatedly arise. It is therefore important

to ascertain the official attitude on this score if possible. From the same source we find the following official communications of the Secretary of the Navy bearing on this point:

Extract from a letter from the Secretary of the Navy to Capt. Charles Stewart, commanding the U. S. Frigate "Constitution" dated September 19th, 1813:

"This system [of destroying marine vessels] gives to one ship the force of many; and by *granting to prisoners a cartel*, as sufficient numbers accumulate, our account on that head will be increased to our credit and not only facilitate the exchange, but insure better treatment to our unfortunate countrymen who are, or may be, captured by the enemy." (Italics ours.)

Extract from letter from the Secretary of Navy to Master Commandant John Orde Creighton commanding U. S. brig "Rattlesnake" and "Enterprise," dated December 22nd, 1813:

"The great object, however, is the destruction of the commerce of the enemy, and *bringing into port the prisoners*, in order to exchange against our unfortunate countrymen who fall into his hands. * * * The enemy has also in violation of his own agreement and in good faith refused to recognize cartels granted at sea. You will therefore grant no cartel nor liberate any prisoner unless under circumstances of extreme and unavoidable necessity." (Italics ours.)

Extract from letter from Secretary of Navy to Master Commandant Johnston Blakely dated March 3rd, 1814:

"It is a great object with the enemy to cap-

ture and detain in prison our seamen; this can only be counteracted by capturing and bringing into port an equal number.”

From the foregoing quotations, it may be said that the safety of the crews of merchant vessels is assumed and the whole tone of the official communications seems based on a proposition which may be framed as follows: We must safeguard the lives of non-combatants of merchant vessels, but let us turn this to our advantage by exchanging them for our own countrymen taken prisoners.

Turning now to the reports of those to whom the instructions were directed, we find that the practice was in all respects in accord with the instructions given.

Extract from letter of Capt. Blakely to the Secretary of the Navy:

“Collection of Official Accounts

H A Fay (N.Y. 1817) p.142):

U.S. Sloop Wasp at sea, 11/Sept. 1814.

Succeeded in cutting out the British brig Mary, laden with brass cannon and military stores . . . *removed the prisoners*, set her on fire, and endeavored to capture another of the convoy but was chased off by the Armada.” (Italics Ours).

In Captain David Porter’s “Journal” of a “Cruise made to the Pacific Ocean” (1822 New York) pp. 225 and 226, the author quotes a letter to his lieutenant acting as Prize Master:

“U.S. Frigate Essex,

Bank’s Bay, 21/August 1813.

To Lieut. John M. Camble,

Prize-Master of the ship Greenwich.

[Extract]

I need not inform you how important it is

that the prizes should not fall into the hands of the enemy. Your situation will render their destruction (in the last extremity) very easy. *I would recommend to you to have as many boats as may be necessary for the escape of their crews, in constant readiness for service.*" (Italics ours).

The same author (page 205) of his Journal describes the capture of a British merchantman which he determined to send to Brazil as a cartel. Her crew protested against this as they feared that in that event, they would be impressed into the British Navy and asked rather that they be permitted to take to the small boats. This request was refused, Porter saying "Lest it might be supposed I had turned them adrift in the middle of the Pacific."

Comment: The sentence last quoted is worthy of more than passing notice because this case has more than merely legal significance. The words were written more than a century ago when conditions on the sea were so hard that we were at war about them. The writer was David Porter, who was the commander, and, in fact, the foster father of Farragut. He was a member of a family which have had a prominent part in the naval history of the United States from the days of the Revolution to the days of the Civil War, and it must therefore be assumed that he was familiar with naval usages and with the principles which actuated naval commanders. He was, moreover, one of the most daring raiders on enemy commerce that this country has produced. This is the man who refused the request of the prisoners he had taken from a British merchantman "lest it might be sup-

posed" that following a capture he had been cruel to non combatants.

These casual comments by naval officials and their reports representing the treatment of crews of merchant vessels furnish an indication of the universal practice of safeguarding the lives of noncombatants captured at sea. Furthermore, the negative force of the absence of such practice being brought into dispute or even specifically mentioned in instructions and reports is of much weight, for had there been cruelties they could not well have passed without record at a time much addicted to pamphlets.

The foregoing discussion has established the following points as regards the practice of the United States:

(1) The practice of safeguarding non combatants captured at sea was universally recognized and adhered to.

(2) The practice was so much a matter of course that it was rarely referred to in official communications.

(3) In the few cases where the subject is officially mentioned, the position of this government is unmistakably evidenced—namely that lives of non combatants at sea are to be protected.

B.

Precedents in the career of the Confederate cruiser "Alabama."

The "Alabama" from the time she was built until she was finally sunk was exclusively under

the control of Captain Semmes. He had been educated for the United States Navy and had served in that navy for upwards of thirty years before the Civil War was commenced. The papers which he prepared at the time of the Civil War and which are incorporated in his personal account of the cruises of the "Sumter" and the "Alabama" ("Service Afloat," by Captain Semmes) show that he had been a student of international law and was entirely familiar with what belligerents might or might not lawfully do.

In his treatment of the commerce of the United States he did not err on the side of leniency and where situations arose which presented a question as to his right to seize or destroy, he almost always resolved them in favor of destroying. For example, he reports a large number of cases where documents relating to cargo showed that the cargo was owned by neutrals, but if the documents were only signed and not sworn to, he declined to recognize them and burned the cargo.

As Capt. Semmes wrote in his personal account of his cruise of the "Alabama" (Service Afloat, p. 386)—"I had not so much as a single port open to me into which I could send a prize." It was imperative, therefore, that he should destroy his prizes, and, as he would not have to invoke the assistance of any prize court, it was not particularly necessary that he should take much trouble to obtain the papers of the vessels he captured. Moreover, his vessel was being hunted by the large and increasing navy of the United States, and the safety of his vessel depended on his ability to intercept American merchant ships on certain of the well known ocean highways, and then to get away to some other part of the seas before word

of his whereabouts could be sent to the United States Navy. Anything that delayed or complicated his capture was thus particularly serious.

Under all these circumstances, Capt. Semmes cannot have been restrained in his treatment of United States merchant vessels by anything less than a clearly understood rule of international law and it is, therefore, important to note what his course was in reference to the rule now under discussion. He did not in a single case attack a merchant vessel without taking adequate precautions for the protection of the crew and passengers. Not less than fifty times in his account of his voyages he refers to this subject and tells of the difficulties to which he was often put by reason of the necessity that was upon him of protecting human life. In the North Atlantic he captured the ship "Tonawanda," which proved to have a number of passengers aboard. There was no claim by any neutral for either cargo or ship, but he released the ship because of the difficulty he would have in caring for the passengers.

Again, near the coast of Cuba, he captured the steamship "Ariel" carrying a number of passengers and again he released the vessel by reason of the difficulty he would have had in caring for the safety of the passengers.

After the close of the Civil War, Capt. Semmes was arrested by the United States Government and a strong effort was made by the Department of Justice to have him punished, but the charges against him had to be dropped because it was found that he had not violated international law.

It cannot be said that his humane treatment of the crews and passengers of the vessels which he captured was prompted by any tenderness for the

Union cause or the Northern people, for his published accounts of his voyages ("Service Afloat") shows that he felt the most intense bitterness against both.

SIXTH POINT.

The German Government has officially recognized the existence of the rule of International Law here contended for by the petitioner.

In answer to the first note addressed by the United States Government to the German Government in reference to the destruction of the "Lusitania," the German Foreign Office addressed to Ambassador Gerard a note under date of May 18, 1915 (see White Book No. 2 U. S. Department of State, p. 169). In that note, commenting on the sinking of the British steamer "Falaba," it is stated—

"In the case of the sinking of the English steamer Falaba, the commander of the German submarine had the intention of allowing passengers and crew ample opportunity to save themselves.

It was not until the captain disregarded the order to lay to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers by signals and megaphone to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes and did not fire the torpedo until suspicious steamers were hurrying to the aid of the Falaba."

It will be observed that the German Government does not here claim that the war zone proclamation of February 4, 1915, absolved it from the necessity of giving proper opportunity for passengers and crew to leave the ship. In the communication of June 9, 1915 from the United States Government to the German Government, this subject is referred to as follows:

“The Government of the United States can not admit that the proclamation of a war zone from which neutral ships have been warned to keep away may be made to operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German Government to question those rights.”

(White Book of the U.S. Department of State entitled *Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Duties European War, No. 2*).

International law permitted a captured enemy merchant vessel to be destroyed where that was necessary, the captor, of course, to be the judge as to the necessity. Article 112 of the German Prize Code relating to this subject provides:

“The commander (of the German naval vessel) may make use of an enemy vessel captured * * * or if the bringing in of the vessel appears to him to be inappropriate or unsafe to destroy the same.” (Prize Code of the German Empire as in force 1 July, 1915—translated by Huberich & Kind, p. 65).

This destruction of an enemy merchant vessel at sea inevitably involves dangers to crew and passengers, for it involves taking to the boats. Therefore, where the zone proclamation of February 4th states that "on and after the 18th of February 1915 every merchant ship found in the said war zone will be destroyed without its being *always* (italics ours) possible to avert the dangers threatening the crews and passengers on that account," it must be assumed that if any weight is to be given to the proclamation that it did not mean more than it said and that it related only to the decision of Germany to destroy all enemy merchant ships and to the dangers which were incident to such ultimate destruction of the ship. Germany had the right to decide whether or not captured enemy ships should be destroyed for international law gave that right. But an attack without warning was an entirely different matter and this international law expressly forbade. The zone proclamation does not purport to dispute the continued existence of that provision of international law.

To contend to the contrary of this would involve extraordinary results. As above shown, the maritime nations of the world had long prohibited the sinking of non-combatants at sea without warning and without an opportunity to save life. To now claim that the German zone proclamation means what it does not say, namely that Germany intended to repudiate this rule as to previous warning involves not only the assumption that one belligerent nation in time of war can change one of the primary rules of international law, but that this may be done by mere implication. And on the basis of this implication it is appar-

ently contended by the claimants in this proceeding that the maritime world was bound to change its whole course of conduct on the assumption that international law had thus been altered and that rights and remedies as between citizens of other countries must be adjusted accordingly. If in time of war one belligerent nation can at will change international law in such a sense that citizens of other countries are thenceforward legally bound to take note of the change and act accordingly, then there is no real force in international law and to claim now that the zone proclamation was legally operative to change this rule is merely another way of saying that there is no such thing as international law. It is still more extraordinary to claim that this can be done by implication, for the zone proclamation does not require such a construction.

It is true that most of the civilized nations are now at war to vindicate this and other rules of international law which have been violated by Germany. But the fact that Germany has violated this rule does not discredit the rule. The question here discussed is—what was the international law on this subject before the war which Germany and other nations were bound to respect? It is because there was a well-known rule and that the rule was broken that we and our Allies are fighting. We ought not to confuse this cause of the war with any aspirations we may have as to new international relations which may result from the war. The rule here contended for is not something new which we hope for as a result of the war. It is an old rule which has long been recognized as binding on nations without any reference to whether they found it convenient or not.

In the long series of notes which passed between the United States Government and the German Government on this subject, it is nowhere claimed by the German Government that it was absolved from observing this rule and the correspondence on this subject practically ended with the letter from the German Government to the United States Government under date of May 4, 1916, following the sinking of the "Sussex" (White Book of State Department, No. 3, p. 302) where the German Foreign Office states (p. 305)—

"The German Government, guided by this idea, notifies the government of the United States that the German naval forces have received the following orders: *In accordance with the general principles of visit and search and destruction of merchant vessels, recognized by international law*, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance." (Italics ours.)

This statement by the German Government was not a concession to the United States but was an admission of existing international law. This is shown by Sec. 116 of the German Prize Code (Huberich & Kind translation, p. 68) which was in force at the time of the sinking of the "Lusitania" and which provided—

"Before proceeding to a destruction of the vessel, *the safety of all persons on board, and, so far as possible, their effects, is to be provided for*, and all ship's papers and other evidentiary material, which according to the views of the persons at interest, is of value for the formulation of the judgment of the

prize court, are to be taken over by the commander.” (Italics ours.)

Comment: The suggestion has been made by certain counsel for claimants that Section 116 of the German Prize Code relates only to neutral vessels which may be captured. A full examination of the Naval Prize Code will, it is submitted, show the contrary, and, as above pointed out, the German Foreign Office has expressly recognized this as the rule of international law which was applicable when it was discussing the capture of an enemy merchantman.

There may be rules of international conduct which a majority of the civilized nations desire to have incorporated into international law but which cannot be so incorporated because a respectable minority withhold their consent. We have seen above that the rule here contended for is not of that sort. It is a rule which has existed for centuries—a rule which practically all maritime nations, Germany included, have assented to.

It is not permissible to argue that because Germany was using a new type of war vessel—the submarine—the old rule did not apply. The maritime codes above referred to were in force after submarines came into use and all of these notes between the governments of the United States and of Germany related expressly to operations of submarines. The rule was obviously adopted to protect the lives of non-combatants on merchant ships, and had nothing to do with the type of vessel or armament of the vessel which made the attack.

SEVENTH POINT.

The United States Government has officially insisted upon the rule here contended for.

The first official communication following the destruction of the "Lusitania" was that dated May 13, 1915, addressed by the State Department of the United States to the Minister of Foreign Affairs at Berlin.

In that communication the right of passengers on merchant ships of belligerent nationality is discussed and the following statement is made—

"It (United States Government) does not understand the Imperial German Government to question those rights. It assumed, on the contrary, that the Imperial Government accept, as of course, the rule that the lives of noncombatants, whether they be of neutral citizenship or citizens of one of the nations at war, cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unarmed merchantman, and recognize also, as all other nations do, the obligation to take the usual precaution of visit and search to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag." (White Book of Department of State No. 1, p. 76.)

The German Minister of Foreign Affairs sent a reply note under date of May 18, 1915, to which Secretary Lansing, replied under date of June 9, 1915.

In that note of June 9, 1915 (White Book of

Department of State No. 2, p. 172), the United States Government assured the German Government that—

“It was its (the United States’) duty to see to it that the Lusitania was not armed for offensive action, that she was not serving as a transport, that she did not carry a cargo prohibited by the statutes of the United States, and that, if in fact she was a naval vessel of Great Britain, she should not receive clearance as a merchantman; and it performed that duty and enforced its statutes with scrupulous vigilance through its regularly constituted officials. * * *

* * * * *

Whatever be the other facts regarding the Lusitania, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. * * * Only her actual resistance to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, *as do the naval codes of all other nations*, and upon it every traveler and seaman had a right to depend.” (Italics ours.)

Whatever we may now (July, 1918), think as to the sincerity of the German Government in its notes in respect to its intention to obey this rule of international law, it is a fact that in May 1915, this rule was insisted upon by our own Government in some of the most important communications which it ever addressed to another Government; that the German Government at no time disputed the existence of the rule, nor did it claim that the promulgation of its war zone order of February 1915 absolved it from the obligation to observe the rule.

When on February 1, 1917, the German Government announced that it would not be bound by this rule of international law, our government immediately broke with Germany and soon after took up the sword.

EIGHTH POINT.

It should be held that the petitioner was legally entitled to assume that a German naval vessel would not destroy the "Lusitania" without previous warning and without giving the passengers and crew an opportunity to leave the vessel.

In another brief filed for the petitioner in this proceeding, the subject of proximate cause is discussed, and in order to pass on that question of proximate cause, it will be necessary for the Court to decide whether or not the intervening act of a

third party (the German naval commander) was unlawful. To repeat what was said at the beginning of this brief—If the act of the German naval commander had been lawful then, unless his act was a probable result of negligence of the petitioner, the petitioner is not liable. And in that event it would only be necessary for the Court to consider whether negligence of the petitioner necessarily led to the attack which caused the loss. But if the act of the German naval commander was unlawful then it is not necessary for the Court to consider what its connection was with any negligence on the part of petitioner, for negligence of the petitioner cannot be the proximate cause of the loss if an independent *illegal* act of a third party intervened to cause the loss.

LUCIUS H. BEERS,
Counsel for Cunard S. S. Co.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

Re LUSITANIA,

PROCEEDING TO LIMIT LIABILITY.

**Memorandum for Petitioner on
Proximate Cause.**

LUCIUS H. BEERS,
Counsel for Cunard S.S. Co.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

MATTER OF PETITION

of

CUNARD STEAMSHIP COMPANY,
LTD., Owner of S. S. "Lusi-
tania" to limit liability.

Before
HON. JULIUS
M. MAYER,
District
Judge.

BRIEF FOR PETITIONER ON PROXI- MATE CAUSE.

It is alleged by the claimants that the Cunard Company was guilty of certain acts of negligence which caused the loss of life and injuries complained of. The Company denies all these allegations of negligence and claims that no act of the Company contributed to the loss of life and injuries. But assuming, for the sake of argument, that the Cunard Company had been guilty of such acts, the Company contends that the proximate cause of the loss was the torpedoing of the "Lusitania" by a German naval vessel.

The law on this subject as laid down by the Federal courts will be found stated in the cases referred to below.

Insurance Company v. Tweed (1868) 7
Wallace 44.

This was an action on a fire insurance policy which contained a *proviso* that an insurer should

not be liable in case the fire happened by means of explosion. The cotton destroyed was in the Alabama Warehouse in Mobile. An explosion occurred in the Marshall Warehouse, which was situated across the street. The explosion scattered combustible materials in all directions and started a fire in the Eagle Mill, which was across another street. Wind blew the fire from the Eagle Mill to the Alabama Warehouse, where the cotton was, and so the loss occurred.

It was held that the Insurance Company was not liable. Justice Miller, writing for the Court, stated the rule as follows:

“One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. *If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.*” (Italics ours).

The foregoing is a statement of the general rule, and the following are the leading authorities in the separate classes of cases to which that rule has been applied.

I.

Cases where the act of a third party is the intervening cause.

Insurance Company v. Boon (1877) 95 U. S. 117.

This action was to recover on a fire insurance

policy for destruction of goods in a store at Glasgow, Mo., destroyed by fire October, 1864. The policy provided that the insurer should not be liable if fire happened by means of any invasion, insurrection or civil commotion, or of any military or usurped power.

An armed force of Confederates attacked the city, which was defended by Union troops until compelled by superior numbers to surrender the place, and in order to prevent the military stores from falling into possession of the Confederates they were destroyed and the City Hall, in which they were, was set on fire. The fire spread along the street from building to building to the store of the plaintiff, which was destroyed with the goods insured.

It was held that the fire which destroyed the goods was excepted from the risk undertaken by the insurers.

Justice Strong, writing the prevailing opinion, reviewed at length earlier authorities on this subject, and held as follows:

“The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to loss. In *Milwaukee & Saint Paul Railway Co. v. Kellogg*, 94 U. S. 469, we said, in considering what is the proximate and what the remote cause of an injury. ‘The inquiry must always be whether there was any intermediate cause *disconnected from the primary fault*, and self-operating, which produced the injury.’ In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident,

a necessary incident and consequence, of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole” (p. 133).

Atchison R. R. Co. v. Calhoun (1909)
213 U. S. 1.

Action for personal injuries. Mrs. Calhoun and her son, the plaintiff, a boy of less than three years of age, were passengers on a train of the Atchison Railroad. The train arrived at Edmond, their destination, at 11:30 in the evening. The station was not called out, nor was she told by the trainmen that it was Edmond. She hastened to get off, leading the boy with her. When she reached the platform of the car the train started. She handed the boy to another passenger, Robertson, who was then standing on the station platform. Robertson took the child, handed him to his son, who was also on the station platform, and told Mrs. Calhoun not to jump off the train, as it was running too rapidly. The station platform was dimly lighted and no employee of the railroad gave Mrs. Calhoun or her boy any assistance, or gave them any warning. At this juncture a young man, named Jones, supposed by Mr. Robertson’s son, who was holding the boy, to be a railroad official, though he was not, took up the child in his arms and ran along by the car attempting, without success, to return the child to his mother, who was standing on the platform of the car; the train, meanwhile, moving with increasing rapidity. Jones ran 75 to 100 feet to the end of the platform, and

there he stumbled over a baggage truck, which had been left within a few feet of the rails, and the child was injured.

The plaintiff claimed that his injuries were due to the obvious negligence of the railroad in not exercising proper care to afford the plaintiff and his mother a reasonable opportunity to leave the car with safety, and the Court said that the railroad was guilty of negligence in this respect; but it held that the railroad was not liable.

Justice Moody, writing for the Court, held:

“In this case undoubtedly the plaintiff’s injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word ‘cause’ when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Insurance Co. v. Tweed*, 7 Wall. 44, 52. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor” (p. 7).

The Young America (1887) 31 Fed. Rep. 749.

A canal boat, which, with others, was being towed by a tug, was broken loose from the tug by a field of ice and went ashore on Staten Island. The tug stood by and tried to render assistance, but her pump froze and she was obliged to go to New York for help.

The wreck-master on Staten Island improperly took possession of the canal boat, took the coal out of her and broke her up and sold the wood.

The owners of the canal boat libelled the tug, claiming that her negligence had contributed to the loss, and the District Court divided the damage.

On appeal to the Circuit Court, this decision was reversed, and it was held that the improper act of the wreck-master was the cause of the damage.

Judge Wallace, writing for the court, held:

“The unlawful acts of third persons, though directly induced by the original wrong of the defendant, are never to be attributed to the original wrong as a proximate cause of the damage for which a recovery can be had. *Knight v. Wilcox*, 14 N. Y. 416; *Lynch v. Knight*, 9 H. L. Cas. 577; *Moore v. Meagher*, 1 Taunt, 39; *Vicars v. Wilcocks*, 8 East. 1; *Collins v. Cave*, 4 Hurl. & N. 225; *Crain v. Petrie*, 6 Hill, 522.”

In the above case the unlawful character of the intervening act of the wreck-master was pointed out as a factor in the decision. Another brief is filed for the Cunard Company in this proceeding dealing with the question whether the attack on the “*Lusitania*” by the German submarine was lawful or unlawful.

Goodlander Mill Co. v. Standard Oil Co.
(1894) 63 Fed. Rep. 400.

The Oil Company shipped oil in a tank car which had no valve in its outlet. The car was run onto a track, which was within a few feet of, and on a higher grade than, the furnace room of the mill. When the cap was taken off the outlet oil started to flow and could not be stopped and it ran into the furnace room of the mill and there caught fire and the mill was destroyed.

The Mill Company claimed that the negligence of the Oil Company, in failing to provide a valve in the outlet caused the flow of oil and the destruction of the mill.

The Court held, however, that the act of placing the tank car immediately alongside of the furnace room of the mill was the proximate cause of the loss.

The Circuit Court of Appeals held:

“The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

In *Insurance Co. v. Boon*, 95 U. S. 117, 130, the court says:

‘The proximate cause is the efficient cause, —the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.’

The remote cause is that cause which some independent force merely took advantage of

to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, a cause of the injury,—an antecedent cause; but, where the negligent act is not wanton or *malum in se*, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, ‘the intervenor acts as a nonconductor, and insulates the negligence’? The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction. *If but for such interposition the defendant’s negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury.* The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances” (p. 405).

* * * * *

“We cannot say that the negligent omission of the valve ‘necessarily set the other causes in operation’; nor can we say that the injury was the natural and probable consequence of the negligent act. In marshalling the probable consequences which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and

abnormal that this injury should result. We are of opinion that intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered effective to an injury that was not the probable and natural consequence of the act'' (p. 406). (Italics ours.)

NOTE:—It will be observed that the decision in the above case directly applies to the case at bar and that the Court's language directly applies to it where it says: "But for such interposition [the torpedoing of the 'Lusitania'] the defendant's negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury."

Cole v. German Savings and Loan Society (1903) 124 Fed. Rep. 113.

As plaintiff was walking along the hallway in defendant's building, for the purpose of taking the elevator, a boy passed her, who was a stranger to her and was not employed by the defendant, but who had once been seen endeavoring to operate the elevator and had a dozen times visited the boy in charge of the elevator. This boy, passing the plaintiff, seized the sliding door of the elevator shaft, pushed it back as far as it would go and stepped back, the elevator being then at an upper story in charge of its regular operator. The plaintiff, supposing the strange boy to be the operator and that the elevator was there, stepped into the shaft, fell and was injured. The hall was dark and gloomy, and it was difficult, though not impossible, to see the elevator. There was no artificial light in the hall, although there were means to make an electric light, which was often lighted just in front of the door of the shaft. The door to the elevator could be opened from the outside even when it was latched.

It was held by the Circuit Court of Appeals that the proximate cause of the plaintiff's injury was the trespass of the boy and not the negligence of the defendant.

Judge Sanborn, writing for the Court, said:

“An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it” (p. 115).

* * * * *

“Unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, *the*

concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence" (p. 117). (Italics ours.)

Jarnagin v. Travelers' Protective Assn.
(1904) 133 Fed. Rep. 892.

This was an action on a policy on the life of Jarnagin and the policy provided that the insurer should not be liable in case of death resulting from intentional injuries inflicted by the insured or any other person. Jarnagin had been placed under arrest by certain deputy sheriffs and had been disarmed, and it was charged that while so disarmed, in the custody of the officers, they had failed to protect him and negligently and without lawful excuse permitted certain persons to assault and shoot him, and it was claimed that the proximate cause of Jarnagin's death was the negligence of the officers in failing to afford him adequate protection, and that without this his death could not have occurred.

The Circuit Court of Appeals held that the insurance company was not liable, and that the assault by third parties, and not the negligence of the officers, was the proximate cause of Jarnagin's death.

The Court said:

"The shots of his assailants were the direct

and proximate cause, and the failure of the officers to protect him was only a condition, which may or may not have contributed to the result. *It may have been easier to kill him because of the condition, but it was not the condition which killed him.* Thus a man with heart disease might be killed by a blow which would not affect a sound man, but nevertheless it would be the blow, and not the heart disease, which killed him" (p. 894). (Italics ours.)

The foregoing decisions are particularly applicable to the case at bar, because in these cases the act of an intervening third party was involved, and it is submitted that these cases state the rule of the Federal Courts applicable to the present case where the act of an intervening third party, The German Government, caused the sinking of the "Lusitania."

This rule of the Federal Courts as to proximate cause does not apply only to cases where a third person intervenes. It is a general rule, as will appear from the following decisions, which represent some of the classes of cases where the question of remote or proximate cause has arisen.

II.

Cases of storm and flood.

Railroad Company v. Reeves (1869) 10 Wallace 176.

Reeves had shipped tobacco from North Carolina to Chattanooga, where it was received by the Memphis & Charleston Railroad to be carried further west. He claimed that the railroad was

guilty of negligence in not forwarding the tobacco promptly, and while it was there a flood in the Tennessee River occurred and the tobacco was injured.

The Trial Court ruled:

“That if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff” (p. 190).

The Supreme Court on appeal did not agree to this statement of the law and it cited two flood cases *Morrison v. Davis & Company*, 20 Pa. State 171 and *Denny v. New York Central Railroad Co.*, 13 Gray 481, in both of which merchandise was injured by flood, because delayed by action of the carrier, and in both of which cases it was held that flood and not the negligence of the carrier was the proximate cause of the delay. Of these decisions, the Supreme Court, Justice Miller writing, said:

“Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court’s charge in this case.”

The above case is the leading case on the subject in the Federal Courts. As is well known, the Courts of New York State hold otherwise.

*Northwest Transportation Company v.
Boston Marine Insurance Company*
(1890) 41 Fed. Rep. 793.

The "Ontario," running at ordinary speed in a dense fog, grounded. Tugs were sent for, but the wind and sea increased to such an extent that before they arrived it was thought necessary to scuttle the boat to prevent her from pounding and being broken up. The cargo was damaged. The underwriters, being sued to recover a general average loss, defended on the ground that the loss came within the exception of the policy, because there was negligence in the navigation of the boat which resulted in the grounding.

The Court held that it was the storm which caused the loss and not any defects of navigation which preceded the grounding.

III.

Railroad cases.

Without here abstracting any considerable number of the many railroad cases in the Federal Courts, in which this question of proximate cause comes up, the following will serve to show that the rule as above stated has been applied in cases of that class.

Schaeffer v. Railroad Company (1881)
105 U. S. 249.

This was an action for damages for death. The deceased was injured in an accident on the defendant road December 7, 1874. As a result of the accident his brain was affected, he lost his mind and on the 8th of the following August committed suicide.

It was claimed that his death was really caused by the railroad accident. The Court held otherwise that the proximate cause of his death was his own act.

Hayes v. Michigan Central R. R. (1883)
111 U. S. 228.

The defendant had neglected to maintain a fence along its track, as required by the city ordinance. At the place where the fence should have been the plaintiff, who was a boy between eight and nine years old, bright and well grown but deaf and dumb, ran on to the tracks of the defendant and was injured by a train. It was held that the railroad was not liable.

In distinction.

The case of *Holladay v. Kennard* (1870) 12 Wallace 254, has been referred to by the claimants as constituting an exception to the rule above stated, and it is therefore necessary to examine that case critically, especially as Justice Bradley, who wrote the opinion, was careful to state that the decision was not meant to be understood as laying down any different rule from that which was laid down by the Supreme Court in the leading case of *R. R. Company v. Reeves*, cited above.

In January, 1865, Holladay operated a stage line across the plains from Atchison to Colorado, and the plaintiff delivered a package of money to his line to be carried to the then territory of Colorado, and it was placed in a safe in charge of an express agent who travelled on the stage. The Civil War was then pending. The Indian tribes on this trail were hostile to the Government and were constantly committing outrages against persons and property whilst crossing the plains between Missouri and Colorado. "It required much courage, coolness, and vigilance to carry on the business of transportation by the overland route."

For the sake of accuracy, the statement of facts given in the report of the case, is quoted as follows:

"Julesburg at that time was a station of the express line, consisting of a log house and stable, a telegraph office and warehouse, occupied by three or four persons in charge. About a mile east of Julesburg was a mud house, called Bulin's ranch. About a mile west of Julesburg was a military post, occupied by about forty United States troops, under command of Captain O'Brien, and consisting of an 'adobe' building about fifty feet long, with several outbuildings, and provided with two or three pieces of light ordnance.

About two o'clock in the morning, when three or four miles east of Julesburg, the stage was fired into by the Indians. Making what speed they could the express agent and driver reached Bulin's ranch with the stage, staid there till daylight, and then went on to Julesburg, where they changed horses. They then proceeded to the military post and informed Captain O'Brien that they had been attacked by Indians, and the express agent requested him to give them an

escort to protect the stage on its further progress. The captain said he could not give them an escort, as he had but forty men on duty, and was then mounting them to go and fight the Indians, who were in sight, and told the agent to remain where he was, as it would not be safe for him to go up the road. He then went with his command to engage the Indians who, he said, were about fifteen hundred in number. After the troops had left the post the express agent changed the mail there and then returned to Julesburg and had the horses put into the stable. They had not been put out more than fifteen minutes when the Indians were observed coming towards the station following the troops, fourteen of whom had been killed. There being no time to hitch the horses to the stage, the driver and express agent mounted each a horse and followed the soldiers back to the military post. The Indians stopped at the station, robbed the stage, and broke open the safe and rifled it of its contents. The troops soon brought the howitzers to bear on the savages and compelled them to retire to the hills."

(Comment). This statement of the action of the express agent is given not to show his negligence so much as to show the sort of man he was, that is, that he had no discretion worth mentioning. He had been attacked that morning by hostile Indians; had reached a military post of comparative safety defended by some light field guns. The commandant warned him not to leave and there were 1500 hostile Indians in sight about to attack. In this situation the agent in charge of the stage left the place of safety, went a mile back away from his destination to an undefended place which was apparently that much nearer the Indians, and there took out the horses and so

made it more difficult to escape quickly with the stage. This conduct shows how devoid of discretion the agent was. The case turned not on the negligence of the agent but on the negligence of Holladay in employing such a man for this work at such a time.

“Upon this evidence the court instructed the jury that the attack of the Indians was that of a public enemy, and that defendant was exonerated from the ordinary responsibility of a common carrier, and was not liable for the loss of the money unless his agents were guilty of some carelessness, negligence, or want of vigilance or attention, which contributed to the loss. The plaintiff below contended that they were guilty of carelessness and negligence, *first*, in leaving the military post after being charged by Captain O’Brien to remain there; *secondly*, in unhitching and putting out the horses, on going back to Julesburg. These points were left, and as this court said ‘very properly left’ to the jury as questions of fact. But in giving the jury instructions on this subject the presiding judge told them.

‘In determining what was the duty of the express agent at that time, I can lay down no better rule for your guidance than this: What, in your judgment, would a cool, self-possessed, prudent, careful man have done with his own property under the same circumstances. * * * Such a man it was the duty of Mr. Holladay to provide for this very hazardous business. It was his duty to provide a cool, self-possessed man, a cautious, prudent man; a man of good judgment and forethought.

Adverting also to the fact that the evidence showed, that if the express agent had taken the advice of Captain O'Brien the stage would not have been robbed, the court added:

'But the result is not the criterion by which you are to judge.'

The defendant's counsel, notwithstanding the language above quoted in italics, regarding the instruction previously given as contrary to law, and as exacting too much from the defendant, at the trial requested the judge to charge.

First. That the capture of the package by the Indians threw on the plaintiff the burden of proving fraud or collusion of the carrier with the captors.

Secondly. That if the jury believed that the express agent exercised his best judgment at Julesburg, the defendant could not be charged with negligence.

Thirdly. That wilful negligence is required to charge a carrier who has lost property by the act of the public enemy'' (pp. 255-257).

The Trial Judge declined to charge the jury as requested by the defendant, and the jury found a verdict for the plaintiff.

The question which came before the Supreme Court was whether or not the charge of the Trial Judge was proper as to the degree of care and attention which under the circumstances was required of Holladay *in the selection of the agent to carry on this extra hazardous work* under the special conditions which then existed on the plains. The Supreme Court held that it was.

But in order to avoid any misunderstanding of the case, Justice Bradley added :

“We do not mean to be understood as laying down any different rule from that which was laid down by this court in the late case of *Railroad Company v. Reeves*, namely, that ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause. We think that when this case, with all its circumstances, is fairly considered, this was all that the judge who tried the cause exacted of the defendant, and that the question of negligence was fairly left to the jury” (p. 259).

Comment on *Holladay v. Kennard*.

Although *Holladay v. Kennard* was decided forty-seven years ago, it will be found that it has not been cited or followed as bearing on the rule with respect to proximate cause though it has been cited in other connections.

This shows that courts have recognized the warning contained in Justice Bradley’s opinion to the effect that it was not to be understood as changing the rule of *R. R. Company v. Reeves*.

Under the special conditions of danger from the Indians existing on the plains in January 1865, it was as necessary that the stage coach should be in charge of a competent man of good judgment as it is that a vessel on a voyage shall be in charge of a competent master. Now, a vessel is not “seaworthy” unless it is furnished “with a captain of general good character and nautical skill” (3 Kent’s Com. 287) and if a marine disaster occurs where there is not a competent master

aboard then the court attributes the disaster not to the master's faults in navigation but to the owner's neglect in not providing the ship with a proper master. In such a case the rule of proximate cause as between the various events which arose during the voyage to produce the disaster is not applied. The court looks back of all these and says that the vessel ought never to have put to sea at all because she was not "seaworthy" as she did not have aboard a competent master.

This is what the court did in *Holladay v. Kenard*. The issue presented to the Supreme Court was as to the sort of an agent Holladay should have provided, and as the events proved that he had appointed an utterly incompetent man without judgment, that was the land equivalent of holding that when he despatched the stage from Atchison she was "unseaworthy," or whatever adjective would be used to describe a land vehicle which was required to traverse a dangerous country and which was not properly equipped for the purpose.

The questions in the *Holladay* case were quite different from those involved here. That was a case of the carriage of goods, consequently the carrier was an insurer. Then arose an exception to that rule because the loss was caused by the public enemy. But when a shipowner has sent out an unseaworthy ship he is not entitled to the benefit of this exception. And it was this principle that the Court applied to this stage owner when he equipped his stage to carry valuables across the Plains in 1865.

The rule as to proximate cause as between what the stage agent did and what the Indians did was not involved, and this the Court was careful to explain.

THE ACT OF THE GERMAN NAVAL COMMANDER IN
TORPEDOING THE "LUSITANIA" WAS THE PROXIMATE
CAUSE OF THE LOSS.

In another brief filed in this proceeding on behalf of the petitioner relating to international law it is shown that the act of the German commander was illegal. But even if it had been legal it was the proximate cause of the loss.

LUCIUS H. BEERS,
for Cunard S.S. Co.

Re LUSITANIA,
PROCEEDING TO LIMIT LIABILITY.

**Memorandum for Petitioner as to Application
of Law of Great Britain.**

LUCIUS H. BEERS,
Counsel for Cunard S.S. Co.

Re “LUSITANIA.”

Brief for petitioner as to application of law of Great Britain.

The claimants allege negligence on the part of the Cunard Company in connection with the navigation of the “Lusitania” and in respect to the conduct of her officers and crew. The “Lusitania” was a British vessel, registered at and sailing from Liverpool. It is, therefore, fundamental that the place of the alleged tort was Great Britain, and it will be shown below that the validity and effect of the provisions of the passage contracts must be determined according to the law of Great Britain.

The persons for whose death or injury claims are made embarked on the “Lusitania” on the terms of passage tickets, which provided *on the face of the tickets and in the body of the contract* as follows:

“It is further understood and mutually agreed that this ticket is issued by the Company and accepted by the passenger subject to the following terms and conditions. * * * The Company will use all reasonable means to insure the ship being sent to sea in a seaworthy state and well found, but is not otherwise liable for loss of, or injury to, the passenger or his luggage or personal effects or delay in the voyage, whether arising from act of God, King’s enemies, perils of the sea, rivers or navigation, barratry, or negligence

of the Company's agents or servants (whether on board the steamer or ashore) defect in the steamer, her machinery, gear or fitting, or from any other cause of whatsoever nature."

On the commission issued to England it was proved that the foregoing clause protecting the Company against liability, even for the negligence of its own servants, was valid by the laws of Great Britain.

It is fundamental that under the common law or in admiralty there is no right of action in cases where death results from a negligent act on the high seas (*The Harrisburg*, 119 U. S. 199) and the representatives of those who lost their lives on the "Lusitania" can base their claims only on the British statute. If the British laws do not give them a cause of action, then this court cannot recognize their claims, and, in determining whether or not they have cause of action under the British law, this court must consider not only the British statute (9 & 10 Vict. Ch. 93), but the declared law of England, for as stated in *Regina v. Dunlop S. S. Co.*, (128 Fed. Rep. 784)

"It is well settled that in such a case the right can only be enforced subject to the limitations that are imposed upon it by the legislature and by the courts of the State."

The clause in the passage ticket is not plead by the Cunard Company *as a defense* to the death claims, but it is an *obstacle which the claimant must dispose of before he can have any claim at all* which this court can consider.

I.

The *lex loci delicti* governs as to all matters pertaining to the right of action.

The rule above stated has been followed in the Federal Courts in many cases involving claims for death by wrongful injury.

Northern Pacific Railroad v. Babcock (154 U. S. 190) was an action brought in the Fourth Judicial District of Minnesota for the killing of one Munro at or near a station known as Gray Cliff on the Northern Pacific Railroad in the Territory of Montana.

The Court, quoting from *Herrick v. Minneapolis & St. Louis Railway Company*, (31 Minn. 11) to the effect "that the law of the place where the right was acquired or the liability was incurred will govern as to the *right of action*," said:

"This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat. 66. In referring to that case in *Texas & Pacific Railway v. Cox*, 145 U. S. 593, the court said: 'The courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury. The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington v. Attrill*, 146 U. S. 657, 670. In-

deed, in *Texas & Pacific Railway Co. v. Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: ‘The question however, is one of general law, and we regard it as settled in *Dennick v. Railroad Co.*’

The contract of employment was made in Montana, and the accident occurred in that State, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*” (pp. 198 199).

Stewart v. Baltimore & Ohio Railroad Company, (168 U. S. 445), was an action brought in the District of Columbia alleging the death of one Casey, killed in the State of Maryland.

The defendant demurred, claiming that the Maryland statute was so different to the statute of the District of Columbia that no action could be maintained either in Maryland or elsewhere unless the special remedy prescribed by the Maryland statutes was pursued.

Mr. Justice Brewer, speaking for the court, said:

“Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely

statutory delict is created. The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Company*, 103 U. S. 11. It may well be that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed. At least it has been held by this Court, in repeated cases that an action for such a tort can be maintained 'where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.' *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 605; see also *Dennick v. Railroad Company*, 103 U. S. 11; *Huntington v. Attrill*, 146 U. S. 657; *Northern Pacific Railroad v. Babcock*, 154 U. S. 190'' (pp. 448, 449).

The Court then discusses the difference between the two statutes, first, as to the party in whose name the suit was required to be brought, and, second, that by the Maryland statutes the damages

must be apportioned between the parties by a jury, and concluded:

“We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland” (p. 450).

Slater v. Mexican National Railroad Company, (194 U. S. 120), was an action brought in the United States Circuit Court for the Northern District of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico to recover damages for the death of William H. Slater, a switchman on the road, killed through the defendant's negligence while coupling two freight cars at Nuevo Laredo in Mexico.

Mr. Justice Holmes, speaking for the Court, said:

“As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & Ohio R. R.*, 168 U. S. 445. *But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences.* On the other hand, it equally little

means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Dennick v. Railroad Co.*, 103 U. S. 11, 18. *But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, Smith v. Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern Pacific R. R. v. Babcock*, 154 U. S. 190, 199, an action was brought in the District of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. *Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught*" (p. 126). (Italics ours.)

The Court then considered the provisions of the Mexican statute and came to the conclusion that the pending action was an action at common law and that the Court had no power to make a decree of the kind contemplated by the Mexican statutes.

Other cases supporting the principle here contended for, are

Van Doren v. Pa. R. R. Co., (93 Fed. Rep. 260);
Erickson v. Pacific Coast S. S. Co., (96 Fed. Rep. 80);
Cowen v. Ray, (108 Fed. Rep. 320);
International Navigation Co. v. Lindstrom, (123 Fed. Rep. 475);

In the last mentioned case the deceased took passage on the steamship "St. Paul," which left the port of New York bound for Southampton May 16, 1900, and on the 21st day of that month was washed overboard by a wave and drowned. The "St. Paul" was owned by the International Navigation Company, a New Jersey corporation, but was registered at the port of New York. The administrator brought the action upon the theory that the death was caused by the negligence of the Company in allowing the deceased to be on the deck of the vessel without protecting the deck with netting or warning her of the danger.

Judge Wallace said:

"Inasmuch as at common law the cause of action for a tortious personal injury does not survive the death of the person injured, there can be no recovery in such a case in the absence of statutory liability, and, as statutes have no extraterritorial operation, there can be no recovery unless the statutory liability arose within the territorial sovereignty of the state whose statute authorizes the recovery; but upon considerations of comity such statutes are enforced by the courts of other states, and when by the statute law of a

state a right of action has become fixed, or a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court having competent jurisdiction over the subject-matter and the parties. Upon this principle it was held in *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, that an action could be maintained in a federal court sitting in New York by the administrator of a deceased person who died in New Jersey from injuries received in that state by the negligence of the defendant, because by a statute of New Jersey a recovery was given to the administrator upon such a cause of action.

The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon a vessel of the state when the vessel is beyond its boundaries as it does when it is physically within the state. The inquiry in the present case, therefore, is whether a recovery was authorized by the statute of the state whose territorial sovereignty embraced the steamship'' (p. 476).

II.

The principle that the *lex loci delicti* governs in determining whether or not a cause of action has arisen goes so far as to bar here an action which could not

have been maintained in the place where the tort was committed, even where the circumstance that bars the action there would not have been available as a defense here.

In actions to recover damages for death caused by wrongful injuries, it is the practice of the Federal Courts to compare the law of the place of the tort with the law of the State in which the court sits.

In this proceeding, therefore, the right to make claims for damages where passengers lost their lives is based on the fact that both in England and in the State of New York actions may be maintained in cases of death by wrongful injury. And any circumstance sufficient in England to bar such an action may be asserted to prevent the cause of action from arising.

In *The A. W. Thompson*, (39 Fed. Rep. 115) a proceeding brought in the District Court for the Southern District of New York for damages for loss of life and to vessel and cargo caused by a collision, the court said as to the claim for damages for loss of life—(Judge Addison Brown writing)

“The action rests entirely upon the state statute. Any defense, therefore, that would bar recovery in the state courts, with reference to which the statute must be deemed enacted, must be held equally good in the admiralty. Besides this, the very language of the New York statute contains the proviso that the wrongful act, neglect, or default shall be ‘such as would, if death had not ensued, have entitled the party injured to maintain

an action to recover damages in respect thereof.' Laws N. Y. 1847, p. 575, c. 450; 4 Edm. St. 526; 7 Edm. St. 591. As the action rests upon the statute it cannot lie except under the conditions which the statute imposes. *The Edith*, 94 U. S. 518. The well-settled law of this state at the time the statute was passed, and now, forbids a recovery of damages by a plaintiff chargeable with contributory negligence."

In the case of *Regina v. Dunlop S. S. Co.*, (128 Fed. Rep. 784), the court held in an action for death—

"But there is another ground, also, on which recovery must be denied, namely, the contributory negligence of the decedent. The right of action depends entirely on the Pennsylvania acts of 1851 (sections 18 and 19; P. L. 674) and of 1855 (P. L. 309); and I think it is well settled that in such a case the right can only be enforced subject to the limitations that are imposed upon it by the legislature and by the courts of the state. *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Canary*, (C. C.) 22 Fed. 532; *The A. W. Thompson*, (D. C.) 39 Fed. 115. It is so well known that in the courts of Pennsylvania the contributory negligence of the decedent defeats the right of recovery, even although the defendant may have been also negligent, that no citation of authority is needed. In the case under consideration, it seems to me to be a point beyond serious controversy that the decedent was negligent."

Comment: It will be observed that in the above admiralty case the court allowed the defense of contributory negligence (which would ordinarily have been inadmissible in

admiralty) to prevail because under the *lex loci delicti* that defense was admissible.

See also *City of Norwalk*, (55 Fed. Rep. 98, 102).

III.

In death cases where it is shown that the deceased released the claim in his lifetime the validity of the release depends on the *lex loci delicti* and not on the *lex fori*.

In *Weir v. Rountree*, (173 Fed. Rep., p. 776), the Adams Express Company had filed their bill against Amy J. Rountree praying that the defendant execute and deliver to a railroad company a release of all claims arising out of the injury or death of H. R. Rountree, and that she be enjoined from prosecuting any such claim.

It appeared by the bill that the express company had entered into an agreement with a railroad company to save it harmless from all damages by reason of injury or loss of life sustained by any agent or employee of the express company, and that H. R. Rountree entered into an agreement with the express company on entering its employment by which he released the express company and the railroad company from all liability in case of death, whether resulting from gross negligence of the railroad company or any employee, or otherwise. The agreement made by Rountree waiving liability was made in Nebraska and was valid in that state, but it was not valid

in Kansas where the accident occurred. The plaintiff moved for a decree on the bill and answer. A decree was entered that the plaintiff was not entitled to the relief prayed for. On appeal, the court said:

“One reason why plaintiff is not entitled to the relief asked is that the injury and death occurred in the state of Kansas, and the rights of the widow are to be measured according to the laws of that state. We need not stop to inquire whether or not the contract in question was valid according to the laws of Nebraska, where executed, as the widow is not basing her action upon such contract, but upon the statute law of Kansas. *Whether such contract is available as a defense to her action we think determinable according to the laws of Kansas.*” (Italics ours.)

In *Smith v. Atchison, T. & S. F. Ry. Co.*, (194 Fed. Rep. 79) the deceased was traveling on a pass by which he assumed all risks of accidents and damages to person and baggage under any circumstances, whether caused by negligence of agents or otherwise. The trial court directed a verdict for the defendant and that ruling presented the only error assigned, which was as follows:

“(1) Plaintiff’s principal contention is that the waiver on the back of the pass was void under a statute of Kansas, as interpreted by its Supreme Court, and, as the pass was delivered in Kansas, it is urged that the validity of the waiver must be determined by the law of that state, though the injury occurred in the state of Oklahoma, under whose laws

the waiver was valid. In support of this contention the plaintiff relies upon the general rule that a contract will be interpreted according to the law of the place of its execution and delivery, citing *Liverpool & Great Western Steamship Co. v. Phenix Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. That was an action upon a contract to recover damages for its breach, and in such a case the rule which plaintiff invokes is generally, though not invariably, enforced. That rule, however, has never been applied in actions of tort like the present. In such cases the law of the place where the injury occurs defines the rights of the parties. The *Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; *Weir v. Rountree*, 173 Fed. 776, 97 C. C. A. 500. The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract. We think not. *The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other.* The attempt to distinguish them met with the following answer by the Supreme Court in *Martin v. Pittsburg & Lake Erie R. Co.*, 203 U. S. 284, 294, 27 Sup. Ct. 100, 102 (51 L. Ed. 184):

‘The contention that because, in the cases referred to, the operation of the state laws, which were sustained, was to augment the liability of a carrier, therefore the rulings are

inapposite here, where the consequence of the application of the state statute may be to lessen the carriers' liability rests upon a distinction, without a difference.''' (Italics ours.)

Comment: It will be observed that the foundation facts on which the above decision rests are identical with the facts in this "Lusitania" case. That is, the clause of the ticket relieving the company from liability even for its own negligence was valid by the law of Great Britain where the alleged tort occurred. Therefore it is valid as a defense even though it might not be valid by the law of the forum or by the law of the place of contract.

In *Lindsay v. Chicago, B. & Q. R. Co.*, (226 Fed. Rep. 23) plaintiff sued the railroad for the death of her husband, who was a waiter and cook in a Pullman car attached to the defendant's train. The death was caused by the negligence of the defendants in Colorado. The contract of employment was executed by the deceased in Pennsylvania, and released all claims for liability, for personal injury or death while traveling over the railroads. The court said—

"If the contract of employment and the release had been made in Colorado, they would be a complete defense to a suit for injuries not resulting in death. * * *

Plaintiff contends, however, that though the law of Colorado, the place where the tort was committed, governs the right to action, the employment contract and release were void in Pennsylvania, where executed, and therefore cannot be availed of as a defense in any jurisdiction. It is unnecessary to consider the effect of a statute prohibiting and nullifying

such releases. Pennsylvania has no such a statute. Its courts do not declare such a release null and void, even if made in Pennsylvania, but merely holds it contrary to the public policy of that state, and therefore unenforceable as a defense when the tort is committed in Pennsylvania, and that, too, though the release was valid where executed. *Hughes v. Pennsylvania Railroad Co.*, 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713. On the other hand, if the injury occurred in a state which recognized the release as valid, the Pennsylvania courts enforce it, even though the contract was made in Pennsylvania. *Taylor v. Adams Express Co.*, 52 Pa. Super. Ct. 449."

The court then said, in considering the Colorado statute—

"The remedy given by section 1509 for a wrongful act causing death is, however, expressly subject to the limitation that the act must be 'such as would (if death had not ensued) have entitled the party injured to maintain an action.' Lindsay's contract and release were not made after a valid cause of action had arisen. *They defined his status in relation to the defendant and prevented a cause of action from arising. As a matter of pleading, they need not be set up by an affirmative plea, but, as was held in the Robinson case, supra, they were admissible in evidence under the general issue.*" (Italics ours.)

It is submitted that the foregoing cases present the following legal situation:

In applying these rules to the case at bar it will appear below that by law of Great Britain a

clause in the passenger's contract ticket limiting the liability of the carrier even for negligence is valid. The Federal courts here will not allow such a limiting clause *as a defense* in cases pending before them, because such a limitation is against our public policy. But in determining *whether a cause of action has arisen* under the statute of another country giving a right of action for death, (if the law of the place of the tort is substantially similar to the law of the State in which the proceeding is brought) the Federal Court will consider the limiting clause in the contract for the purpose of determining whether any cause of action in favor of the claimant arose at the place of the tort.

IV.

Under the law of Great Britain the limiting clause contained in the passage contracts would prevent the representatives of passengers who lost their lives from bringing action in Great Britain under Lord Campbell's Act.

One of the special objects of issuing a commission to England in this proceeding was to obtain proof as to the British law on this subject and Mr. Greer was examined and cross-examined at great length on the subject. (Com. pp. 380-403; Ex. F. A. G. 1).

In view of the eminence of Mr. Greer, counsel on both sides in England evidently considered it unnecessary to take further testimony on the subject.

In Mr. Greer's statement, (F. A. G. 1, subd. 5) he says, after certain preliminary discussion—

“It follows that if any of the passengers who lost their lives on the ‘Lusitania’ in respect of whom actions are being brought were themselves precluded by the terms of their contract from bringing any action based on any wrongful acts, neglects or defaults which resulted in their death, no claim can be successfully made for damages under Lord Campbell's Act. So far as English law is concerned the question as to whether the condition appearing upon the face of the contract exempting shipowners from liability for negligence is or is not part of the contract between the passenger and the Company depends upon the following considerations:—

a. Such a clause if proved to be part of the contract is valid and binding in English law.”

Continuing, Mr. Greer testified on the question whether the conditions upon the face of the ticket formed part of the contract between the parties and said:

“The condition will be deemed to be part of the contract even if the passenger did not know that there were any conditions upon the ticket if the Company did what was reasonably sufficient to bring the condition to the notice of the passenger.

See *Parker v. S. E. Railway* 2 C. P. D. 416.
Richardson v. Rountree 1894 A. C. 217.
Marion 1909 2 K. B.
Ryan v. Oceanic 1914 3 K. B. 741.
Cook v. Wilson 32 “Times” Law Reports 160”.

[See Ex. F. A. G. 1, p. 2].

On the subject of bringing the limitation clause to the notice of the passenger, Mr. Greer was asked—

Q. Suppose the facts proved to be these: The passenger was a person who could read and write and was of normal intelligence, and that the conditions were legibly printed upon the face of the ticket and included a negligence clause; in your opinion would it be open to a jury to find that the carrying company had not taken reasonable steps to bring the conditions on the ticket to the notice of the passenger?

A. I think not. I think a verdict to that effect would be one which would be set aside."

(Com. p. 394, 395).

It further appeared that *Cook v. Wilson*, in the Court of Appeal (32 "Times" Law Reports, p. 160) was the latest case in regard to these conditions. In that case, "All that the defendant company had done was to hand a ticket to the plaintiff" with the limitation clause in the ticket. (Com. p. 396). A verdict was found by the jury in favor of the passenger, but the Court of Appeal set it aside and held that there was no evidence on which they were entitled to give a verdict for the plaintiff.

Lord Phillimore, in his opinion, said:

"It is impossible to lay down that shipping companies were bound to provide for people who would not read what was put in front of them. The defendants had done all that was necessary on their part to give reasonable notice and on the evidence he thought that

only one result was possible, namely, to enter judgment for the defendants."

(Com. p. 396).

V.

The limitation clause in the passage contracts prevented the claimants from having any cause of action under the laws of Great Britain, and having no cause of action there they have no cause of action which this court should entertain.

LUCIUS H. BEERS,
Counsel for Cunard Co.

United States District Court,

Southern District of New York.

IN THE MATTER

of the

Petition of THE CUNARD STEAMSHIP COMPANY, LIMITED, as owner of the S. S. "Lusitania" for limitation of liability.

Memorandum for Petitioner in Reply.

LUCIUS H. BEERS,
Counsel for Cunard Steamship Co.

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of the

PETITION OF THE CUNARD STEAMSHIP COMPANY, LIMITED, as owner of the S. S. "LUSITANIA" for limitation of its liability.

MEMORANDUM FOR PETITIONER IN REPLY.

Counsel for the claimants present their views on the subject of international law for the first time in the claimants' reply brief, and the importance of this subject will, it is thought, justify a brief reply to two of the contentions there made for the claimants.

I.

The petitioner had contended that it was entitled to the protection of the principle stated thus by Judge Sanborn: "It is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellows will either

violate the laws or disregard their duties.” [Cole v. German Savings and Loan Society, 124 Fed. Rep. 113, 119.] In reply to this the claimants contend (Claimants Reply Brief, p. 17), that this principle does not apply here because there is a difference between the case of an individual who can be restrained by the police power and the case of a nation which cannot be so restrained.

There are two answers to this contention of the claimants. One is that this rule stated as above by Judge Sanborn is based in part on the impracticability of administering justice upon any other principle. We know that the existence of the police power does not, in all cases, prevent individuals from violating the laws. But if, in administering the rights and remedies of men, the courts had to assume that in a certain proportion of cases laws would not be obeyed by others, so much difficulty and confusion would result that the administration of justice would become practically impossible, and this is the reason for the statement that it is “impracticable and impossible” to administer justice on the theory that laws will be violated and duties disregarded. This is one of those rules like the rule that all men are presumed to know the law. All men do not know the law and cannot know the law, but if ignorance of the law were admitted as a defense justice could not be administered. This is one of those rules which grows out of the human necessities which attend the administration of justice.

The second answer to the claimants’ contention is that the presumption that there will be obedience to law ought to be stronger in the case of a great government than in the case of an individual. Individuals, even when wholly free

from wrong motives, may act from impulse or caprice or in mischief. But in the case of the formal instructions of a great government to its naval commanders, these disturbing factors cannot well appear and it is reasonable to assume that the government maintained by many millions of people would not deliberately instruct its naval commanders to violate international law.

In this case we know what the rule was which was laid down by the German government for the guidance of its naval commanders. (Sec. 116, German Prize Code; see Petitioner's Memorandum on International Law, p. 40.) That is, we know that this official rule was that "before proceeding to a destruction of the vessel the safety of all persons on board and as far as possible their effects is to be provided for." So, in this case, the principle that the Cunard Company was entitled to assume that Germany would act in accordance with international law did not rest on any fiction. And if the Court should go so far as to hold that the Cunard Line in May, 1915, was bound to have an infallible knowledge of what the official orders to German naval commanders were, then an investigation of that subject would disclose this rule of the German Prize Code, and it would further appear that as late as the sinking of the "Sussex," almost a year afterward, the German government recognized this as being a statement of international law on the subject. (See Petitioner's Brief on International Law, p. 40.)

Since May, 1915, Germany has seen fit to violate the rule of international law here contended for, but we must consider this subject in the light of the knowledge which the petitioner, in com-

mon with the civilized world, had in May, 1915, and not in the light which we now have, more than three years later.

As bearing upon the contention in claimants' brief that a breach of international law by Germany in May, 1915, was more readily to be anticipated than a breach of municipal law by an individual because of a lack of deterrent influences in the former case, the Court can take judicial notice that in May, 1915, Germany was extremely anxious to keep the United States out of the war and that this anxiety was naturally to be generally considered as a probable deterrent from any flagrant violation of international law on the part of Germany, such as the sinking of the "Lusitania" concededly was.

Evidence of the existence and continuance of this deterrent influence is found in the German Government's explanation of the sinking of the "Falaba" and in its attempted disclaimer of the attack on the "Sussex," and in its promise growing out of that incident.

II.

In discussing the precautions which claimants' counsel claim that the petitioner was bound to observe, they argue that this case was analagous to the imaginary case of a person who has been warned that a riot is in progress in a certain locality, but who, nevertheless, takes a child through the place where the riot is in progress so that the child is injured by the rioters. A riot involves the risk of flying stones or flying bullets.

That is the *well known* risk which one takes if he goes where there is rioting.

In this case the tragedy occurred because the attack on the "Lusitania" was *without warning*. The risk of attack without warning was not a known risk on May 1st, 1915. It was a risk unknown in the maritime world.

And so this riot illustration of the claimants indicates the mistake which many Americans have made in considering this "Lusitania" case, by failing to recognize the distinction between (1) the danger the "Lusitania" ran of being captured and eventually sunk, and (2) the danger of an attack *without notice*, and provision for the safety of all persons on board.

Under international law, the Germans had a perfect right to capture the "Lusitania," and if they could not then take her into port they had the right to sink her, provided, as their own Prize Code directed, "the safety of all persons on board and as far as possible their effects is to be provided for." But to torpedo the "Lusitania" *without warning* was a flagrant violation of international law. The whole point of the case against Germany growing out of the "Lusitania" was not that the vessel itself was sunk, but that a murderous attack was made on the *human beings* on board the ship because the vessel was torpedoed *without warning*, and they were thus inevitably exposed to the loss of their lives, as was the case with so many of them.

This distinction is of the utmost importance in considering this contention of the claimants as to what the Cunard Company was bound to anticipate. The Cunard Company was bound to anticipate that, if captured, the "Lusitania" might be

sunk after passengers and crew had been taken off. But the Company was not bound to anticipate that the German Government would torpedo a great passenger vessel without warning.

So far as counsel can recall, there was no evidence that the Germans had before May 7th, 1915, sunk any passenger vessel except the "Falaba," and the statement of that case as contained in the official communication of May 28, 1915, from the German Minister of Foreign Affairs to Ambassador Gerard was

"In the case of the sinking of the English steamer *Falaba*, the commander of the German submarine had the intention of allowing passengers and crew ample opportunity to save themselves.

It was not until the captain disregarded the order to lay to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers by signals and megaphone to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes and did not fire the torpedo until suspicious steamers were hurrying to the aid of the *Falaba*." (See White Book of U. S. Dept. of State "European War No. 2" p. 169.)

It is fundamental that a vessel may be attacked if she disregards an order to lay to and takes to flight.

The fact that the German Foreign Office several weeks after the sinking of the "Lusitania" was careful to explain the circumstances of their attack on the "Falaba" and of the submarine commander's intention to regard the dictates of international law, indicates that before the "Lusitania" was sunk the German commanders had in-

structions to undertake at least to obey the rule which forbade an attack without warning.

The Cunard Company prior to May, 1915, was not bound to anticipate that the Germans might sink without warning, and, as a matter of fact, nobody thought it possible that they would do such a thing. The conduct of the passengers who were concerned in this tragedy shows this fact more emphatically than any argument can. All these matters connected with submarine warfare and the risks to passengers were then receiving the most intense and critical attention in the United States, and the newspapers were full of discussions on the subject, yet an unusually large number of passengers deliberately sailed on this ship and risked their lives on the conviction that Germany would not do such a thing as she then proceeded to do.

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DON'T TURN IT DOWN NOR OPEN IT TOO WIDE.
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READ PROMPTLY AND RETURN, IT MAY HAVE OTHER FRIENDS.

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